

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of  
Decisions, Rulings, Regulations, Notices, and Abstracts  
Concerning Customs and Related Matters of the  
U.S. Customs Service  
U.S. Court of Appeals for the Federal Circuit  
and  
U.S. Court of International Trade**

**VOL. 35**

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**NO. 44**

*This issue contains:*

U.S. Customs Service

T.D. 01-77

General Notices

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Slip Op. 01-87, 01-92, and 01-109 **PUBLIC VERSION**

Slip Op. 01-115 Through 01-117

**DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE**

## **NOTICE**

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# U.S. Customs Service

## *Treasury Decision*

(T.D. 01-77)

### CANCELLATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Customs Broker License Cancellation.

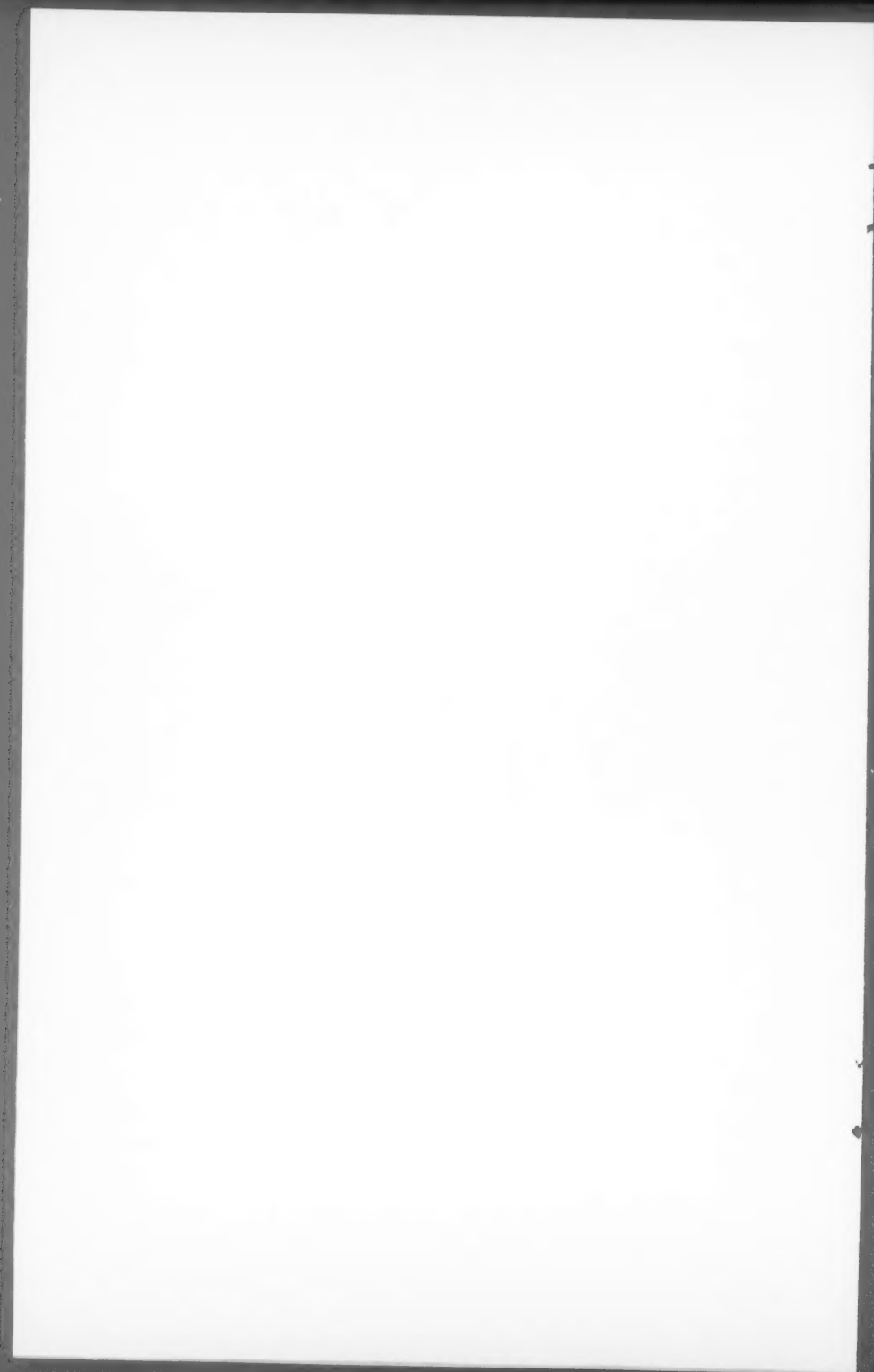
SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker license is canceled without prejudice.

<i>Name</i>	<i>License #</i>	<i>Port Name</i>
F.X. Coughlin Company .....	4382	Detroit

Dated: October 17, 2001.

BONNI G. TISCHLER,  
*Assistant Commissioner,*  
*Office of Field Operations.*

[Published in the Federal Register, October 22, 2001 (66 FR 53472)]



# U.S. Customs Service

## *General Notices*

### QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of Customs duties. For the quarter beginning October 1, 2001, the interest rates for overpayments will be 6 percent for corporations and 7 percent for non-corporations, and the interest rate for underpayments will be 7 percent. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: October 1, 2001.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298-1200, extension 1349.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the short-term Federal rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2001-47 (*see*, 2001-39 IRB 1, dated September 24, 2001), the IRS determined the rates of interest for the calendar quarter beginning October 1, 2001, and ending December 31, 2001. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate (4%) plus three percentage points (3%) for a total of seven percent (7%). For corporate overpayments, the rate is the Federal short-term rate (4%) plus two percentage points (2%) for a total of six percent (6%). For overpayments made by non-corporations, the rate is the Federal short-term rate (4%) plus three percentage points (3%) for a total of seven percent (7%). These interest rates are subject to change for the calendar quarter beginning January 1, 2002, and ending March 31, 2002.

For the convenience of the importing public and Customs personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

Beginning Date	Ending Date	Underpayments (percent)	Overpayments (percent)	Corporate Overpayments (Eff. 1-1-99) (percent)
Prior to				
070174	063075	6 %	6 %	
070175	013176	9 %	9 %	
020176	013178	7 %	7 %	
020178	013180	6 %	6 %	
020180	013182	12 %	12 %	
020182	123182	20 %	20 %	
010183	063083	16 %	16 %	
070183	123184	11 %	11 %	
010185	063085	13 %	13 %	
070185	123185	11 %	11 %	
010186	063086	10 %	10 %	
070186	123186	9 %	9 %	
010187	093087	9 %	8 %	
100187	123187	10 %	9 %	
010188	033188	11 %	10 %	
040188	093088	10 %	9 %	
100188	033189	11 %	10 %	
040189	093089	12 %	11 %	
100189	033191	11 %	10 %	
040191	123191	10 %	9 %	
010192	033192	9 %	8 %	
040192	093092	8 %	7 %	
100192	063094	7 %	6 %	
070194	093094	8 %	7 %	
100194	033195	9 %	8 %	
040195	063095	10 %	9 %	
070195	033196	9 %	8 %	
040196	063096	8 %	7 %	

<i>Beginning Date</i>	<i>Ending Date</i>	<i>Underpayments (percent)</i>	<i>Overpayments (percent)</i>	<i>Corporate Overpayments (Eff. 1-1-99) (percent)</i>
070196	033198	9 %	8 %	
040198	123198	8 %	7 %	
010199	033199	7 %	7 %	6 %
040199	033100	8 %	8 %	7 %
040100	033101	9 %	9 %	8 %
040101	063001	8 %	8 %	7 %
070101	123101	7 %	7 %	6 %

Dated: October 17, 2001.

ROBERT C. BONNER,  
*Commissioner of Customs.*

[Published in the Federal Register, October 22, 2001 (66 FR 53472)]

## CUSTOMS TRADE SYMPOSIUM 2001

AGENCY: U.S. Customs Service, Treasury.

ACTION: Notice of Customs Trade Symposium 2001.

SUMMARY: This document announces that the U.S. Customs Service will convene a major trade symposium that will feature joint discussions by Customs, members of the trade, and other public and private sector representatives on the challenges of facilitating the flow of commerce in a heightened security environment. Newly appointed Customs Commissioner Robert C. Bonner will be the keynote speaker. This event is open to members of the international trade and transportation community and other interested parties.

DATE: Reception and pre-registration will be held on Monday, November 26, 2001, from 6:00 p.m. to 8:00 p.m. The symposium will be held on Tuesday, November 27, 2001, from 8:30 a.m. to 6:00 p.m. All registrations must be made on-line and confirmed by November 19, 2001.

ADDRESS: The meeting will be held in Washington, D.C. at the J.W. Marriott Hotel, 1331 Pennsylvania Avenue, N.W.

FOR FURTHER INFORMATION CONTACT: ACS Client Representatives; Customs Account Managers; or the Office of the Trade Ombudsman at (202) 927-1440 ([trade.ombudsman@customs.treas.gov](mailto:trade.ombudsman@customs.treas.gov)). To obtain the latest information on program changes or to register on-line, visit the Customs website at <http://www.customs.gov/trade2001>.

SUPPLEMENTARY INFORMATION: The cost is \$150.00 per individual and includes a reception and luncheon. All registrations must be

made on-line at the Customs website (<http://www.customs.treas.gov/trade2001>). Registrations will be accepted on a space available basis and must be confirmed by November 19, 2001. The J.W. Marriott has reserved a block of rooms for November 26<sup>th</sup> and 27<sup>th</sup> for overnight accommodations. The room rate is \$119 US dollars and reservations must be confirmed with the Marriott by November 9, 2001. Call 1-800-228-9290 and reference "U.S. Customs Trade Symposium 2001".

Dated: October 18, 2001.

EULA D. WALDEN,  
*Acting Trade Ombudsman,  
U.S. Customs Service.*

[Published in the Federal Register, October 23, 2001 (66 FR 53656)]

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#### PERFORMANCE REVIEW BOARD— APPOINTMENT OF MEMBERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General Notice.

SUMMARY: This notice announces the appointment of the members of the U.S. Customs Service Performance Review Boards (PRB's) in accordance with 5 U.S.C. 4314(c)(4). The purpose of the PRB's is to review senior executives' performance appraisals and to make recommendations regarding performance appraisals and performance awards.

EFFECTIVE DATE: October 1, 2001

FOR FURTHER INFORMATION CONTACT: Robert M. Smith, Assistant Commissioner, Human Resources Management, U.S. Customs Service, 1300 Pennsylvania Avenue, NW, Room 2.4-A, Washington, D.C. 20229; Telephone (202) 927-1250.

#### BACKGROUND

There are two PRB's in the U.S. Customs Service.

#### *Performance Review Board 1*

The purpose of this Board is to review the performance appraisals of senior executives rated by the Commissioner of Customs. The members are:

Donnie Carter, Deputy Assistant Director, Recruitment and Hiring, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury

Anna Fay Dixon, Director, Office of Finance and Administration, Office of the Under Secretary for Enforcement, Department of the Treasury

Kenneth Papaj, Deputy Commissioner, Financial Management Service, Department of the Treasury

Barry Hudson, Director, Office of Financial Management, Department of the Treasury

Tim Skud, Director, Office of Trade and Tariff Affairs, Department of the Treasury

*Performance Review Board 2*

The purpose of this Board is to review the performance appraisals of all senior executives *except* those rated by the Commissioner of Customs. The members are:

William F. Riley, Director, Office of Planning, Office of the Commissioner

Assistant Commissioners:

Douglas M. Browning, International Affairs

Marjorie L. Budd, Training and Development

S.W. Hall, Information and Technology/CIO

C. Wayne Hamilton, Finance/CFO

Dennis H. Murphy, Public Affairs

William A. Keefer, Internal Affairs

Robert M. Smith, Human Resources Management

Deborah J. Spero, Strategic Trade

Bonni G. Tischler, Field Operations

John C. Varrone, Investigations

Dated: October 15, 2001.

ROBERT C. BONNER,  
*Commissioner of Customs.*

[Published in the Federal Register, October 19, 2001 (66 FR 53285)]

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
*Washington, DC, October 17, 2001.*

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

DOUGLAS M. BROWNING,  
*Acting Assistant Commissioner,  
Office of Regulations and Rulings.*

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PROPOSED MODIFICATION/REVOCATION OF RULING  
LETTERS AND TREATMENT RELATING TO TARIFF  
CLASSIFICATION OF RECORDED DATA ON AUTOMATIC DATA  
PROCESSING MACHINES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification/revocation of ruling letters and treatment relating to tariff classification of recorded data on automatic data processing machines.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke one ruling letter and to modify eight others pertaining to the tariff classification of data installed on the hard disk drive of automatic data processing machines under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before November 30, 2001.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings. Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address during regular business hours.

FOR FURTHER INFORMATION CONTACT: Tom Peter Beris, General Classification Branch, (202) 927-1726.

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke one ruling letter and modify eight others pertaining to the tariff classification of recorded data on automatic data processing machines. Although in this notice Customs is specifically referring to nine rulings, [see Attachments A through J], this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the eleven identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the im-

porter or its agents for importations of merchandise subsequent to this notice.

Note 6 to Chapter 85, HTSUS, states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

In the nine rulings, Customs, based on its interpretation of Note 6 to Chapter 85, HTSUS, determined that data that came pre-installed on the hard disk drive of an automatic data processing machine was required to be separately classified as recorded media. These nine rulings, labeled as Attachments A through I, are as follows: HQ 950675 (January 7, 1992); HQ 956962 (September 13, 1994); HQ 960259 (November 12, 1997); HQ 958808 (May 15, 1996); HQ 957981 (July 9, 1997); HQ 959651 (July 9, 1997); NY A86557 (August 30, 1996); NY E86558 (September 14, 1999); NY E83923 (July 26, 1999).

It is now Customs position that in a proper interpretation of Note 6 to Chapter 85, HTSUS, data that comes pre-installed on the hard disk drive of an automatic data processing machine need not be separately classified as recorded media of heading 8523 or 8524, HTSUS, because the hard disk platters in a hard disk drive are not media of either heading 8523 or 8524, HTSUS. Thus the platters fall outside of the scope of Note 6 and are subsumed into the system, regardless of whether they are recorded or unrecorded.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke one ruling and to modify eight others and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 965254; HQ 965255; HQ 965256; HQ 965271; HQ 965272; HQ 965273; HQ 965276; HQ 965277; and HQ 965279. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Customs revocation/modification herein relates only to the extent that certain language in the nine rulings no longer reflects Customs view of Note 6 to Chapter 85, HTSUS. There is no change in the classification determinations in the nine rulings. Proposed HQ 965254, HQ 965255, HQ 965256, HQ 965271, HQ 965272, HQ 965273, HQ 965276, HQ 965277, and HQ 965279 modifying/revoking the nine rulings are set forth as Attachments J through R to this document.

Dated: October 12, 2001.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

## [ATTACHMENT A]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, January 7, 1992.

CLA-2 CO:R:C:M 950675 MBR

Category: Classification

Tariff No. 8524.90.40

JOHN S. RODE  
RODE & QUALEY  
295 Madison Avenue  
New York, NY 10017

Re: Automatic Data Processing Machine Software: Recorded Media: Floppy Diskette:  
Hard Disk Drive.

DEAR MR. RODE:

This is in response to your letter of October 8, 1991, on behalf of Biomedical Instrumentation, Inc., requesting classification of certain ADP software, under the Harmonized Tariff Schedule of the United States (HTSUS).

*Facts:*

Biomedical Instrumentation, Inc., manufactures the "EPLab System" which is capable of accomplishing all of the functions of the traditional form of electrocardiograph, i.e., measuring, displaying, and recording the electrical currents which are generated in a patient's heart during an electrophysiological study.

The EPLab System utilizes proprietary software to analyze the recorded data and compile appropriate reports for display on the EPLab monitor, or for subsequent printing.

The software produced by Biomedical Instrumentation, Inc., will be imported either in floppy diskette form or downloaded on the hard disk drive.

*Issue:*

What is the classification of software (recorded media) in the form of floppy diskette or hard disk drive?

*Law and Analysis:*

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part:

\*\*\* classification shall be determined according to the terms of the readings and any relative section or chapter notes \*\*\*

Chapter 85, Legal Note 6., states: [r]ecords, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended."

Recorded media in the form of software has been consistently classified by Customs in subheading 8524.90.40, HTSUS, whether or not it is entered with apparatus for which it is intended. See HQ 086624, dated May 4, 1991, and HQ 086851, dated April 9, 1990.

*Holding:*

The Biomedical Instrumentation, Inc., recorded media (proprietary software), either in the form of floppy diskettes or downloaded on the hard disk drive, is classified in subheading 8524.90.40, HTSUS, whether or not it is entered with the rest of the EPLab System. The rate of duty is 9.7 cents per square meter of recording surface.

ARTHUR P. SHIFFLIN,  
(for John Durant, Director,  
Commercial Rulings Division.)

## [ATTACHMENT B]

DEPARTMENT OF THE TREASURY  
 U.S. CUSTOMS SERVICE  
 Washington, DC, September 13, 1994.  
 CLA-2 CO:R:C:M 956962 LTO  
 Category: Classification  
 Tariff No. 8524.90.40 and 9010.20.60

MR. TERRY WADOWSK  
 LUMUC CORPORATION  
 2380 Mississauga Road  
 Mississauga, Ontario  
 L5H 2L1 Canada

Re: Photocards Kiosk; Software; Chapter 85, note 6; HQs 086126, 086624, 086851, 950675; NAFTA; Article 509; general notes 12(b)(i), 12(b)(ii)(A), and 12(t)/90.25(A); Change in Tariff Classification; NY 898735.

DEAR MR. WADOWSKI:

This is in response to your letter of July 15, 1994, to Customs in New York, concerning the applicability of the North American Free Trade Agreement (NAFTA) and classification of Photocards Kiosks under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response.

*Facts:*

The article in question is a Photocards Kiosk, which is a machine that allows a customer to design a photographic business card. The Photocards Kiosk permits the user to select a background image from a library of digital images. The Kiosk also permits the user to add a picture by scanning a photograph, cropping it and positioning it on the business card. The user can then add a logo by choosing one from a library of logos or by scanning in the customer's own logo. Text can be added by using the built-in word processor. The design is saved on a disk until it is transferred to a negative for printing.

The output of the Photocards Kiosk is a roll of exposed 35 mm film which is processed using separate processing equipment available in the photographic laboratory. The Kiosk does not contain any film processing or printing equipment. As presently configured, the Kiosk is sold only to photographic laboratories.

The Kiosk contains the following components: a Ricoh KR-10M SLR camera with Ricoh 35-70 mm lens; high resolution computer monitor; a UMAX flat bed scanner; a computer (486DLC-33 with 250 Mb hard disk drive) with monitor and mini keyboard; computer speakers; touch screen; and video splitter/multiplier. The Kiosk uses Canadian developed and produced software. The software, which is described as the "heart" of the system, incorporates stereo sound, recorded voice, photographic quality images and an interactive touch screen to guide the user through the design process. The software is permanently fixed in the Kiosk's hard disk drive, and is designed to work only with the Photocards Kiosk.

In NY 898735, issued to you on June 28, 1994, the Kiosk was held to be classifiable under subheading 9010.20.60, HTSUS, which provides for other apparatus and equipment for photographic laboratories, while the Kiosk's software was classified separately under subheading 8524.90.40, HTSUS, which provides for records, tapes and other recorded media for sound or other similarly recorded phenomena. In this ruling, you were asked to provide more information if you were seeking a ruling on the applicability of the NAFTA.

*Issue:*

I. Whether the Photocards Kiosk and its software are classifiable under subheading 9010.20.60, HTSUS, or whether its software is separately classifiable under subheading 8524.90.40, HTSUS.

II. Whether the Photocards Kiosk and its software are eligible for preferential treatment under the NAFTA.

*Law and Analysis:*

*I. Classification*

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classifi-

cation shall be determined according to the terms of the headings and any relative section or chapter notes \* \* \*

The Photocards Kiosk is a machine that allows a customer to design and produce a photographic business card. The Kiosk creates a standard 35 mm negative that can be processed using virtually any photo processing equipment. The Kiosk, which is sold only to photographic laboratories, is described under heading 9010, HTSUS, which provides for "[a]pparatus and equipment for photographic (including cinematographic) laboratories (including apparatus for the projection of circuit patterns on sensitized semiconductor materials), not specified or included elsewhere in this chapter \* \* \*". Specifically, the Kiosk is classifiable under subheading 9010.20.60, HTSUS, which provides for other apparatus for photographic laboratories.

However, note 6 to chapter 85, HTSUS, provides that "[r]ecords, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended." The Photocards Kiosk consists of software that is permanently fixed in the Kiosk's hard disk drive. The software package is designed to work only with the Photocards Kiosk and the Kiosk cannot operate without the software.

Customs has addressed the issue of whether chapter 85, note 6, extends to permanently installed software. HQ 950675, dated January 7, 1992, concerned the classification of a system that measured, displayed and recorded the electrical currents generated in a patient's heart during an electrophysiological study. The system utilized proprietary software to analyze the recorded data and compile the appropriate reports for display on the system's monitor, or for subsequent printing. We held that the software, whether imported in floppy disk form or downloaded onto the system's hard disk drive, was classifiable under subheading 8524.90.40, HTSUS, whether or not entered with the rest of the system. See also, HQ 086624, dated May 4, 1991; HQ 086851, dated April 9, 1990; HQ 086126, dated March 6, 1990. Accordingly, the Kiosk's software is classifiable under subheading 8524.90.40, HTSUS.

## II. Nafta Applicability

You contend that the Photocards Kiosk is eligible for duty-free treatment under the NAFTA. To be eligible for tariff preferences under the NAFTA, goods must be "originating goods" within the rules of origin in general note 12(b), HTSUS. General notes 12(b)(i) and (ii)(A), HTSUS, state:

[f]or the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "*goods originating in the territory of a NAFTA party*" only if—

(i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or

(ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein \* \* \*

The Kiosk contains a scanner, monitors, keyboard, video splitter/multiplier, 35mm camera and a pair of speakers imported into Canada from non-NAFTA countries. The Kiosk also contains a computer that consists of a U.S.-made chip and hard disk drive (33% U.S.). Because the Kiosk contains goods from countries other than Mexico, Canada and/or the U.S., general note 12(b)(i) does not apply. Consequently, we must resort to general note 12(b)(ii)(A), HTSUS.

Because the Kiosk is provided for under subheading 9010.20.60, HTSUS, a transformation is evident when a change in tariff classification occurs which is authorized by general note 12(t)/90.25(A), HTSUS, which states:

[a] change to subheadings 9010.10 through 9010.30 from any other heading \* \* \*

Thus, any non-originating materials in the Kiosk must come from a heading other than subheadings 9010.10, HTSUS, through 9010.30, HTSUS.

None of the non-originating materials are classifiable under heading 9010, HTSUS. For example, the monitors, keyboard and scanner are classifiable under heading 8471, HTSUS (automatic data processing machines and units thereof), the camera is classifi-

able under heading 9006, HTSUS (photographic cameras) and the speakers are classifiable under heading 8518, HTSUS (loudspeakers, whether or not mounted in their enclosures).

Consequently, a change in tariff classification does occur, and the Photocards Kiosk, containing a scanner, monitor, keyboard, video splitter/multiplier, television monitor, 35 mm camera, pair of speakers, etc., from non-NAFTA countries, is eligible for preferential treatment under the NAFTA.

The Canadian developed and produced software, which is separately classifiable under subheading 8524.90.40, HTSUS, is also eligible for preferential treatment under the NAFTA according to general note 12(b)(i), HTSUS. If the software is developed and produced in a non-NAFTA country, it is still eligible for preferential treatment under the NAFTA according to general note 12(b)(ii)(A). Because the non-originating components of the Photocards Kiosk went through the necessary transformation, the Kiosk is an "originating good." Thus, the software, which is separately classifiable, is also considered an "originating good."

*Holding:*

The Photocards Kiosk is classifiable under subheading 9010.20.60, HTSUS, which provides for other apparatus for photographic laboratories. The Photocards Kiosk's software is classifiable under subheading 8524.90.40, HTSUS, which provides for other recorded media.

The Kiosk and the software are eligible for preferential treatment under the NAFTA. The Column 1 (Special) (CA) rate of duty for articles of subheading 9010.20.60, HTSUS, is *free*. The Column 1 (Special) (CA) rate of duty for articles of subheading 8524.90.40, HTSUS, is 3.8 cents/square meters of recording surface.

MARVIN M. AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

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[ATTACHMENT C]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC, November 12, 1997.

CLA-2 RR:CR:GC 960259 DWS  
Category: Classification  
Tariff No. 8524.99.90, 8537.10.90,  
9026.80.60, and 9032.89.60

MR. PAUL S. ANDERSON  
SONNENBERG & ANDERSON  
200 South Wacker Drive  
Chicago, IL 60606

Re: Reconsideration of NY A88137; Gob Image Analyzing System; Gob Image Analyzer; Gob Weight Controller; Chapter 90, Note 6(a); Explanatory Note 90.32; Chapter 90, Note 3; Section XVI, Notes 1(m) and 4; Chapter 85, Note 6; HQ 956962; 8501; 8423.30.00; 9031.49.90.

DEAR MR. ANDERSON:

This is in response to your letters of February 19 and September 2, 1997, on behalf of GeDevelop, Inc., requesting reconsideration of NY A88137, dated October 24, 1996, concerning the classification of a Gob Image Analyzing System under the Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to 625(c)(1), Tariff Act of 1930 [19 U.S.C. §1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103-82, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY A88137 was published on October 1, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 40. No comments were received in response to the notice.

*Facts:*

The merchandise consists of a Gob Image Analyzing System (GIA System), which is composed of a Gob Image Analyzer (GIA) and a Gob Weight Controller (GWC). You claim that the primary function of the GIA System is to monitor and control the flow of molten glass to ensure that the optimal amount of molten glass is poured into a mold which will shape the end product.

A gob is a small amount of molten glass which is allowed to fall from the hearth to the molding machine which will shape the molten glass into a container. A flow of molten glass travels through a tube connected to the hearth. Gobs are formed by intermittently stopping the flow of molten glass. In the production of glass containers, the desired weight and shape of the gobs varies depending upon the desired end product. The weight of a gob directly relates to the flow of the molten glass through the tube. The flow of the molten glass is controlled by moving the tube through which it flows.

The GIA System measures the temperature, width, and speed of the gob as it is falling. From this data, it calculates the gob's weight and shape. The GIA System will then compare the gob's weight, shape, and temperature to prescribed parameters. If a gob's weight falls outside prescribed parameters, the GIA System will alter the flow of the molten glass by adjusting the tube height. This will, in turn, affect the weight of subsequent gobs. If a gob's shape or temperature falls outside prescribed parameters, the GIA System will notify the operator of the discrepancy by means of an audible or visual alarm.

The GIA consists of four main components: a camera consisting of sensors with a charge-coupled device (CCD) array housed in an aluminum case; a computer dedicated for use in the GIA System which includes a central processing unit (CPU), software, system disk, disk drive, monitor, and keyboard; a scale used to calibrate the GIA; and a gob-shape-change switch. The camera consists of a series of sensors capable of detecting the radiation emitted by a gob of molten glass. As the gob falls, it passes in front of the sensors. The light emitted from the hot piece of molten glass will illuminate part of the CCD array equal in size to the width of the falling gob. The sensors will also determine the speed of the falling gob as it enters and exits the path of the sensors. This information is converted into electronic data transmitted by cable to the computer. From this data, the computer will calculate the gob's weight. A pictorial representation of the falling gob, based on the data collected by the sensors, will be shown on the computer's color monitor. This information will be stored on the computer's system disk and may be sent to the customer's main process control system to log and print the information. The GIA will then compare the characteristics of the falling gob to prescribed parameters. As the prescribed parameters depend upon the container being manufactured, they may be adjusted using the gob-shape-change switch.

The GIA also incorporates an optical pyrometer which measures the temperature of the falling gob. You state that the temperature of the falling gob is not a characteristic controlled in the manufacturing process, but is of interest to the engineers.

If the GIA discovers that the gob weight is not within the prescribed parameters, a signal will be sent to the GWC. The GWC will then adjust the tube height accordingly to adjust the flow of the molten glass through the tube thereby changing the gob weight. The GWC performs this function utilizing a motor which is not a part of the GIA System.

You request that we determine the correct classification of the GIA System, and the classification of the GIA and GWC as if they were imported separately. The holding in NY A88137 did not address the latter issue.

*Issue:*

Whether the GIA System is a functional unit classifiable under subheading 8423.30.00, HTSUS, as a scale for discharging a predetermined weight of material into a bag or container, including hopper scales, under subheading 9031.49.90, HTSUS, as an other optical measuring or checking instrument or appliance, or under subheading 9032.89.60, HTSUS, as an other automatic regulating or controlling instrument or apparatus.

Whether the GIA is a functional unit classifiable under subheading 8423.30.00, HTSUS, as a scale for discharging a predetermined weight of material into a bag or container, including hopper scales, or under subheading 9026.80.60, HTSUS, as an other instrument or apparatus for measuring or checking the flow, level, pressure, or other variables of liquids or gases.

Whether pre-installed software in the computer of the GIA and GIA System is separately classifiable under subheading 8524.99.90, HTSUS, as other recorded media for sound or other similarly recorded phenomena.

Whether the GWC is classifiable under subheading 8537.10.90, HTSUS, as an other board, panel, etc., for electric control of electricity.

*Law and Analysis:*

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

The subheadings under consideration are as follows:

8423.30.00: [w]eighing machinery (excluding balances of a sensitivity of 5 cg or better), including weight-operated counting or checking machines; weighing machine weights of all kinds; parts of weighing machinery; constant-weight scales and scales for discharging a predetermined weight of material into a bag or container, including hopper scales.

The general, column one rate of duty for goods classifiable under this provision is 1.8 percent *ad valorem*.

8524.99.90: [r]ecords, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of chapter 37: [o]ther: [o]ther: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 3.9 cents per meter squared of recording surface.

8537.10.90: [b]oards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517: [f]or a voltage not exceeding 1,000 V: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 3.7 percent *ad valorem*.

9026.80.60: [i]nstruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 9014, 9015, 9028, or 9032; parts and accessories thereof: [o]ther instruments and apparatus: [o]ther: [o]ther.

Goods classifiable in this provision receive duty-free treatment.

9031.49.90: [m]easuring or checking instruments, appliances and machines, not not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: [o]ther optical instruments and appliances: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 6.1 percent *ad valorem*.

9032.89.60: [a]utomatic regulating or controlling instruments and apparatus; parts and accessories thereof: [o]ther instruments and apparatus: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 3 percent *ad valorem*.

We will first deal with the classification of the entire GIA System under the HTSUS. In NY A88137, Customs held the GIA System to be classifiable under subheading 9031.49.80, HTSUS (precursor to 1997 subheading 9031.49.90, HTSUS). You contend that the GIA System is classifiable as a functional unit under subheading 9032.89.60, HTSUS. Because heading 9031, HTSUS, excludes goods specified or included elsewhere in chapter 90, HTSUS, we must determine whether the GIA System is described under heading 9032, HTSUS.

Chapter 90, note 6(a), HTSUS, states that:

[h]eading 9032 applies only to:

(a) Instruments and apparatus for automatically controlling the flow, level, pressure or other variables of liquids or gases, or for automatically controlling temperature, whether or not their operation depends on an electrical phenomenon which varies according to the factor to be automatically controlled.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes, although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). In part, Explanatory Note 90.32(I) (p. 1659) states:

(I) **INSTRUMENTS AND APPARATUS FOR AUTOMATICALLY CONTROLLING THE FLOW, LEVEL, PRESSURE OR OTHER VARIABLES OF LIQUIDS OR GASES, OR FOR AUTOMATICALLY CONTROLLING TEMPERATURE**

**Automatic control apparatus for liquids or gases and apparatus for automatically controlling temperature** form part of complete automatic control systems and consist essentially of the following devices:

(A) **A device for measuring** the variable to be controlled (pressure or level in a tank, temperature in a room, etc.); in some cases, a simple device which is sensitive to changes in the variable (metal or bi-metal rod, chamber or bellows containing an expanding liquid, float, etc.) may be used instead of a measuring device.

(B) **A control device** which compares the measured value with the desired value and actuates the device described in (C) below accordingly.

(C) **A starting, stopping or operating device.**

Apparatus for automatically controlling liquids or gases or temperature, within the meaning of Note 6(a) to this Chapter, consists of these three devices forming a single entity or in accordance with Note 3 to this Chapter, a functional unit \* \* \*

Instruments and apparatus for automatically controlling the flow, level, pressure and other variables of liquids or gases or for automatically controlling temperature are connected to an appliance which carries out the orders (pump, compressor, valve, furnace burner, etc.) which restores the variable (e.g., liquid measured in a tank or temperature measured in a room) to the prescribed value, or which, in the case of a safety system, for instance, stops the operation of the machine or apparatus controlled. This appliance, generally remote controlled by a mechanical, hydraulic, pneumatic or electric control is to be classified in its own appropriate heading (pump or compressor: **heading 84.13 or 84.14**; valve: **heading 84.81**, etc.) \* \* \*

Chapter 90, note 3, HTSUS, states that:

[t]he provisions of note 4 to section XVI apply also to this chapter.

Section XVI, note 4, HTSUS, states that:

[w]here a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

The GIA and the GWC, imported together as a unit, function together to meet the terms of Explanatory 90.32. The GIA acts both as a measuring device in that it measures the flow of molten glass (liquid) by calculating the weight of a falling gob of molten glass, and as a control device in that it compares the weight of the falling gob against prescribed parameters and transmits a signal to the GWC if adjustments need to be made. The GWC acts as an operating device in that it adjusts the height of the tube through which the molten glass is flowing utilizing a motor. As stated in Explanatory Note 90.32, the motor (an "appliance which carries out the orders") is not a part of the GIA System and is separately classifiable under heading 8501, HTSUS.

The GIA System consists of individual components (GIA and GWC) intended to contribute together to a clearly defined function (automatically controlling the flow, weight, shape and temperature of liquids) covered by heading 9032, HTSUS. Therefore, the GIA System is functional unit described under subheading 9032.89.60, HTSUS, and it is precluded from classification under subheading 9031.49.90, HTSUS.

It has been suggested that the GIA System is a functional unit described under subheading 8423.30.00, HTSUS. Although the GIA does incorporate a scale and part of the function of the GIA is to calculate the weight of a gob, we find that function of the GIA as a whole is not encompassed by heading 8423, HTSUS. It is stated in the supplied literature that the GIA monitors temperature, shape, and weight, and it is our understanding that all three factors must meet certain specification requirements for each different end pro-

duct. Also, to be classifiable under subheading 8423.30.00, HTSUS, the predetermined weight of material must be discharged in a bag or container. It is our position that, in this case, a mold is not a container for heading 8423, HTSUS, purposes, and we note that none of the containers involved in any Customs ruling concerning subheading 8423.30.00, HTSUS, is similar to a mold.

Section XVI, note 1(m), HTSUS, states that:

[t]his section does not cover:

(a)-(ij) xxx

(m) Articles of chapter 90.

Even if the GIA System were described under heading 8423, HTSUS, because it is an article of chapter 90, HTSUS, it would be precluded from classification in chapter 84, HTSUS.

We will now determine the classification of the GIA imported separately. Because the principal function of the GIA is to monitor and control the flow of molten glass, it is our position that it consists of individual components (CCD camera, computer, scale, gob-shape-change switch, and optical pyrometer) intended to contribute to a clearly defined function covered by heading 9026 (measuring or checking the flow, weight, shape, and temperature of liquids), HTSUS.

For the same reasons as with the GIA System, the GIA is precluded from classification under heading 8423, HTSUS. Therefore, the GIA, when imported separately, meets the terms of heading 9026, HTSUS, and is classifiable under subheading 9026.80.60, HTSUS.

Chapter 85, note 6, HTSUS, states that:

[r]ecords, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended.

Therefore, any pre-installed software in the computer of the GIA and GIA System is separately classifiable under subheading 8524.99.40, HTSUS. See HQ 956962, dated September 13, 1994.

As it is our understanding that the GWC functions as a programmable controller, it is classifiable under subheading 8537.10.90, HTSUS.

#### *Holding:*

The Gob Image Analyzing System is a functional unit classifiable under subheading 9032.89.60, HTSUS, as an other automatic regulating or controlling instrument or apparatus.

When imported separately, the Gob Image Analyzer is a functional unit classifiable under subheading 9026.80.60, HTSUS, as an other instrument or apparatus for measuring or checking the flow, level, pressure, or other variables of liquids or gases.

Any pre-installed software in the computer of the GIA and GIA System is separately classifiable under subheading 8524.99.40, HTSUS, as other recorded media for sound or other similarly recorded phenomena.

When imported separately, the Gob Weight Controller is classifiable as a functional unit under subheading 8537.10.90, HTSUS, as an other board, panel, etc., for electric control of electricity.

NY A88137 is revoked. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. §1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs regulations [19 C.F.R. §177.10(c)(1)]

MARVIN AMERNICK,  
(for John Durant, Director,  
Tariff Classification Appeals Division.)

## [ATTACHMENT D]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

Washington, DC, May 15, 1996.

CLA-2 RR:TC:MM 958808 LTO

Category: Classification

Tariff No. 8524.90.40 and 9031.40.80

PORT DIRECTOR  
U.S. CUSTOMS SERVICE  
10 Causeway Street  
Room 603  
Boston, MA 02222-1059

Re: Protest 0401-95-100749; Scanning Laser Vibrometers; HQs 950675, 954117, 955617, 956962, 957813; NY 871914 *affirmed*; section XVI, note 4 ("functional unit"); chapter 85, note 6; chapter 90, note 3; chapter 90, additional U.S. note 3 ("optical"); subheading 9031.80.00; laser.

## DEAR PORT DIRECTOR:

The following is our decision regarding Protest 0401-95-100749, which concerns the classification of Polytec PI's Scanning Laser Vibrometers under the Harmonized Tariff Schedule of the United States (HTSUS). The subject merchandise was entered on November 29, 1994, and the entry was liquidated on July 14, 1995. The protest was timely filed on October 12, 1995.

*Facts:*

The PSV-100-US Scanning Laser Vibrometers are used for monitoring and measuring vibrations in a variety of articles, including but not limited to, machinery, automobiles, aerospace components and domestic appliances. The vibrometers measure the velocity and absolute displacement of a point on a vibrating structure in an entirely, non-contact manner.

The vibrometers consist of a data management subsystem, which consists of a high performance personal computer (PC) with high resolution color monitor, the OFV-302-R laser-based sensor head and a vibrometer controller, which also provides instrument control and data analysis capabilities. The PC is pre-loaded with proprietary software.

The laser in the sensor head is a low power, visible laser. It contains a remote focus lens, which is controlled from the computer keyboard or with a handset that plugs into the controller. The laser sensor head is installed inside the OFV-050 scanning unit. The scanning unit contains the drive electronics, a video camera, a pair of laser scan mirrors and motor. The scanning unit gathers and collects raw data which is then interpreted by the computer software.

The Scanning Laser Vibrometers were entered under subheading 9031.80.00, HTSUS, which provides for other measuring or checking instruments. They were classified upon liquidation under subheading 9031.40.80 (now 9031.49.80), HTSUS, which provides for other optical measuring or checking instruments.

*Issue:*

Whether the Scanning Laser Vibrometers are classifiable as optical measuring or checking instruments under subheading 9031.40.80, HTSUS.

*Law and Analysis:*

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes \* \* \*."

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Note 3 to chapter 90, HTSUS, states that the provisions of note 4 to section XVI, HTSUS, also apply to chapter 90. Note 4 to section XVI, HTSUS, provides as follows:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

The components of the Scanning Laser Vibrometers contribute together to perform a function clearly defined by heading 9031, HTSUS, namely, measuring (and monitoring) the velocity and absolute displacement of a point on a vibrating structure. Accordingly, the vibrometers are "functional units," and are classifiable under heading 9031, HTSUS, although the issue of whether they are considered "optical" remains.

Additional U.S. Note 3 to chapter 90, HTSUS, provides that the terms *optical appliances* and *optical instruments* "refer only to those appliances and instruments which incorporate one or more optical elements, but do not include any appliances or instruments in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose." The vibrometers incorporate a laser and remote focus lens in their sensor heads, and video cameras and lens scan mirrors in their scanning units.

Customs has previously considered the classification of other laser-based inspection systems. In HQ 954117, dated August 22, 1994, we determined that the Sira Image Automation laser-based inspection system, which was designed to identify defects in flat homogeneous products, was classifiable as an optical checking instrument under heading 9031, HTSUS. The system incorporated lenses which focused its laser beam onto the surface of the products being examined, mirrors which controlled the direction of the beam and a mirrored, rotating polygon, which caused the beam to be swept across the product.

In HQ 955617, dated March 29, 1995, we considered the classification of the Geotronics Industrial Measuring System. We determined that the Geotronics system, which was designed to measure the thickness of the refractory brick lining of steel vessels, was classifiable as an optical measuring/checking instrument under heading 9031, HTSUS. The system incorporated a laser, transmitting and receiving optics and angle sensing discs, which consisted of a glass disc and two prisms.

In HQ 957813, dated June 30, 1995, we considered the classification of the LR 2000 Laser Profiler Refractory Measuring System. We determined that the LR 2000, which was designed to measure and analyze the wear on refractory linings, was classifiable as an optical measuring/checking instrument under heading 9031, HTSUS, as an optical measuring or checking instrument. The system incorporated a laser, optical sight and other measurement optics.

In HQ 954117, HQ 955617 and HQ 957813, the systems' lasers, in combination with the optics located outside of each laser—the lenses, mirrors and mirrored polygon in the Sira system; the transmitting optics, receiving optics and angle sensing discs in the Geotronics system; and the optical sight and measurement optics in the LR 2000—led to the determination that the systems were "optical" ones. We found that the optical components of each system—critical components in the performance of each system's measuring function—were not for some subsidiary purpose, such as, "viewing a scale."

Similarly, the Scanning Laser Vibrometer's laser, in combination with the video camera, lens scan mirrors and remote focus lens, lead us to the determination that the system is an "optical" one. The protestant argues that the system's scanning unit simply gathers and collects raw data which is then interpreted by the computer software, which performs the measuring function. However, without the raw data collected by the optical devices, there would be no data to interpret. Thus, the vibrometers are classifiable, according to note 3 to chapter 90, as optical measuring or checking instruments, under subheading 9031.40.80, HTSUS. NY 871914, dated March 25, 1995, which held that similar scanning vibrometers were classifiable as optical measuring or checking instruments under heading 9031, HTSUS, is *affirmed*.

Note 6 to chapter 85, HTSUS, provides that "[r]ecords, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended." The Scanning Laser Vibrometers include a PC that is pre-loaded with proprietary software. We have previously held that recorded software, whether imported in floppy disk form or downloaded onto a PC's hard disk drive, must be classified under subheading 8524.90.40, HTSUS. See HQ 950675, dated January

7, 1992; HQ 956962, dated September 13, 1994. Thus, the vibrometer's software must be classified separately under this subheading.

*Holding:*

The PSV-100-US Scanning Laser Vibrometers are classifiable under subheading 9031.40.80, HTSUS. The vibrometers' software is classifiable under subheading 8524.90.40, HTSUS.

The protest should be *GRANTED* to the extent reclassification of the software as indicated above results in a net duty reduction or partial allowance. In accordance with section 3A(11)(b) of Customs Directive 099 3550-065, dated August 4, 1993, Subject: Revised Protest Directive, this decision, together with the Customs Form 19, should be mailed by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to the mailing of the decision. Sixty days from the date of the decision the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and the public via the Diskette Subscription Service, Freedom of Information Act and other public access channels.

MARVIN AMERNICK,  
(for John Durant, Director,  
Tariff Classification Appeals Division.)

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[ATTACHMENT E]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC, July 9, 1997.  
CLA-2 RR:TC:MM 957981 RFA  
Category: Classification  
Tariff No. 8443.59.50

MR. R. KEVIN WILLIAMS  
O'DONNELL, BYRNE, BASHAM & WILLIAMS  
20 North Wacker Drive  
Suite 1416  
Chicago, IL 60606

Re: Digital Color Printers; Printing Machinery; Automatic Data Processing (ADP) Units; Functional Unit; Legal Note 5 to Chapter 84; Legal Note 4 to Section XVI; General EN to Chapter 84; HQs 088024 and 957491.

DEAR MR. WILLIAMS:

This is in response to your letter dated April 27, 1995, to the then Regional Commissioner of Customs, New York, on behalf of AM Multigraphics, concerning the tariff classification of the Xeikon DCP-1 digital color printers ("DCP-1") under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response. In preparing this ruling, we also considered the information provided with your letters of May 1, 1996, and July 1, 1997. We sincerely regret the delay in responding.

*Facts:*

The merchandise, labeled as the Xeikon DCP-1, is a 4-color digital printer specially designed for short-run, full color applications. Instead of requiring the costly intermediate steps, such as mechanical art, film and plate-making, commonly associated with color printing, the DCP-1 prints directly from digital data to paper. Images, text and line art can be created on any standard desktop publishing system that produces PostScript Level 2 output. The DCP-1 is an example of a new type of commercial product known in the industry as short-run printing with digital presses or "digital print-on-demand". Completed jobs are sent digitally to the DCP-1 where they are stored internally in memory for printing on the web-fed printing engine. The printing engine contains two sets of four CMYK (cyan, magenta, yellow, and black) printing units. One set of printing units is on each side

of the paper, allowing for duplex printing in a single pass. The DCP-1 prints at a speed of up to 70 duplex pages per minute.

The DCP-1 consists of five subsystems: a paper supply unit; a print tower; a paper output unit; a digital system; and a cooling unit. The paper supply unit holds the paper rolls (the print web) used during the operation of the DCP-1. The paper rolls are mounted on an axle in the paper supply unit. The unit is designed so that paper rolls may be changed when a different paper size or grade is needed for a new job. The paper supply unit also conditions the paper by monitoring the moisture content. The web drive motors in the printing tower feed the paper from the paper supply unit.

The printing tower contains eight print units four on each side of the paper web) which prints the document by electrostatic means. The paper is then cooled and cut before leaving the print tower. The paper output unit receives the cut paper sheets, separating blank waste sheets and test prints from the finished product as it leaves the printing tower. The cooling unit cools the water used by the four conditioning circuits which are regulating the temperature and humidity in the printing tower, cooling the paper after it passes the heated roller, and cooling the writing heads.

The digital system, which controls the operation of the DCP-1, consists of two control computers (the host and the print engine supervisor), and three functional subsystems (the host interface, the imaging control system, and the instrumentation control system). Both computers are dedicated solely to operating the DCP-1 system and are incapable of accepting additional software other than that provided with the DCP-1.

*Issue:*

Is the DCP-1 digital color printer classifiable as an automatic data processing (ADP) printer, or as printing machinery under the HTSUS?

*Law and Analysis:*

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

Legal Note 4 to Section XVI, HTSUS, states that: "[w]here a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function." The DCP-1 consists of five subsystems (a paper supply unit, a print tower, a paper output unit, a digital system, and a cooling unit) intended to contribute together to the clearly defined function of printing.

You claim that the DCP-1 is an ADP printer classifiable under heading 8471, HTSUS. Heading 8471, HTSUS, is governed by the terms of Legal Note 5 to Chapter 84, HTSUS, which provides, in relevant part:

(B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all the following conditions:

- (a) It is of a kind solely or principally used in an automatic data processing system;
- (b) It is connectable to the central processing unit either directly or through one or more other units; and
- (c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

\* \* \* \* \*

(D) Printers, keyboards, X-Y coordinate input devices and disk storage units which satisfy the conditions of paragraphs (B)(b) and (B)(c) above, are in all cases to be classified as units of heading 8471.

(E) Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

Based upon Legal Note 5(B) and 5(D), you state that the DCP-1 is an ADP printer. However, the DCP-1 is more than just an ADP printer, it is an entire printing system which acts as a functional unit designed to replace off-set printing presses. Legal Note 5(E) to chapter 84 clearly states that machines performing a specific function are to be classified in the heading appropriate to their respective functions.

The issue remains which of the above legal notes determines the classification of the subject merchandise. In HQ 957491, dated July 31, 1996, Customs stated that Legal Note 5(D) must be read in light of Legal Note 5(E) to chapter 84, HTSUS. Customs concluded that "while note 5(D) negates the sole or principal use requirement when considering the classification of printers, keyboards, X-Y coordinate input devices and disk storage units, note 5(E) provides a separate prerequisite to the classification of any ADP machine and, therefore, ADP unit."

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the HTSUS. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 FR 35127, 35128 (August 23, 1989). General EN (E) for Chapter 84, states that:

**MACHINES INCORPORATING OR WORKING IN CONJUNCTION WITH AN AUTOMATIC DATA PROCESSING MACHINE AND PERFORMING A SPECIFIC FUNCTION**

In accordance with the provisions of the last paragraph of Note 5 to Chapter 84, the following classification principles should be applied in the case of a machine incorporating or working in conjunction with an automatic data processing machine, and performing a specific function:

(i) A machine incorporating an automatic data processing machine and performing a specific function other than data processing is classifiable in the heading corresponding to the function of that machine or, in the absence of a specific heading, in a residual heading, and not in heading 84.71.

(ii) **Machines presented with an automatic data processing machine and intended to work in conjunction therewith to perform a specific function other than data processing, are to be classified as follows: the automatic data processing machine must be classified separately in heading 84.71 and the other machines in the heading corresponding to the function which they perform unless, by application of Note 4 to Section XVI or Note 3 to Chapter 90, the whole is classified in another heading of Chapter 84, Chapter 85 or of Chapter 90 [emphasis added].**

According to the sales literature, the DCP-1's technology "will revolutionize short-run, full color printing with faster turnaround, targeted custom documents and increased profits." On December 5, 1993, *The New York Times* published an article titled "Gutenberg Goes Digital", which states, in part, that: "[a] new generation of presses is emerging that eliminates the metal plates, creating flexibility that should allow shorter press runs and even let the publisher make on-the-fly changes. A full-color advertising circular, for example, could carry a message tailored to each individual customer."

Based upon the information in the above-cited articles, we find that the DCP-1 is a functional unit by application of Legal Note 4 to Section XVI and Legal Note 5(E) to chapter 84, and is performing the specific function of short-run four color printing. Heading 8443, provides for printing machinery. Therefore, we find that the DCP-1 is classifiable under heading 8443, HTSUS, as printing machinery.

We note that it has been suggested that the EN 84.43 for this heading limits printing machinery to those types of machines that print by means of the type, printing blocks, plates or cylinders of heading 8442, HTSUS. However, nothing in the legal text of heading 8443 provides for such limitations. Furthermore, "[i]t must also be remembered that the tariff statutes were enacted 'not only for the present but also for the future, thereby embracing articles produced by technologies which may not have been employed or known to commerce at the time of the enactment \* \* \*.'" *Nec America, Inc. v. United States*, 8 CIT 184, 186(1984), citing *Corporacion Sublistatica, S.A. v. United States*, 1 CIT 120, 126, 511 F.Supp. 805, 809 (1981); See also *Davis Turner & Co. v. United States*, 45 CCPA 39, 41, C.A.D. 669 (1957). See also *Simmon Omega, Inc. v. United States*, 83 Cust.Ct. 14, C.D. 4815 (1979), and *Trans-Atlantic Co. v. United States*, 471 F.2d 1397, 60 CCPA 100, C.A.D. 1088 (1973), in which the courts have held that technological advancements and "improvement in the design of an article does not militate against its continuing to be a form of the named articles." See HQ 088024 (January 3, 1991), in which Customs held that the 3M Digital Matchprint Color Proofing System was a technologically advanced, special purpose, printing proofing system suitable only for proofing printing jobs and therefore classifiable under subheading 8443.50.50 [now 8443.59.50], HTSUS, as other printing machinery.

We further note that the merchandise includes software. Legal Note 6 to chapter 85, HTSUS, provides that "[r]ecords, tapes and other media of heading 8523 or 8524 remain

classified in those headings, whether or not they are entered with the apparatus for which they are intended." In HQ 950675, dated January 7, 1992, Customs held that software, whether imported in floppy disk form or downloaded onto the system's hard disk drive, was classifiable under heading 8524, HTSUS, whether or not entered with the rest of the system. Therefore, the subject software should be classified separately under heading 8524, HTSUS. At the time of entry, the proper subheading shall be determined based upon what type of media the software is recorded on and whether or not it contains sounds and images.

*Holding:*

Based upon the application of Legal Note 4 to Section XVI, the Xeikon DCP-1 digital color printer is classifiable under subheading 8443.59.50, HTSUS, which provides for: "[p]rinting machinery, including ink-jet printing machines, other than those of heading 8471 \* \* \*; [o]ther printing machinery: [o]ther: [o]ther. \* \* \*". The column one, general rate of duty is 1.3 percent *ad valorem*.

The software is classified within heading 8524, HTSUS, as recorded media. At the time of entry, the proper subheading shall be determined based upon what type of media the software is recorded on and whether or not it contains sounds and images.

MARVIN AMERNICK,  
(for John Durant, Director,  
Tariff Classification Appeals Division.)

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[ATTACHMENT F]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC, July 9, 1997.  
CLA-2 RR:TC:MM 959651 RFA  
Category: Classification  
Tariff No. 8443.59.50

MR. CHARLES SPOTO  
FRITZ COMPANIES, INC.  
150-20 132nd Avenue  
Jamaica, NY 11430

Re: Digital Color Printers; Printing Machinery; Automatic Data Processing (ADP) Units; Functional Unit; Legal Note 5 to Chapter 84; Legal Note 4 to Section XVI; EN 84.43; General EN to Chapter 84; HQs 088024 and 957491.

DEAR MR. SPOTO:

This is in response to your letter dated January 18, 1996, to the then Regional Commissioner of Customs, New York, on behalf of Bayer Corporation-AGFA Division, concerning the tariff classification of the AGFA Chromapress digital color printing system ("Chromapress") under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response. We regret the delay in responding.

*Facts:*

The merchandise, labeled as the Chromapress, is a 4-color digital printing system used in the graphic arts field for short-run, full color applications at high speeds. The Chromapress is an example of a relatively new type of commercial product known in the industry as short-run printing with digital presses or "digital print-on-demand". Instead of requiring the costly intermediate steps, such as mechanical art, film and plate-making, commonly associated with color printing, the Chromapress prints directly from digital data to paper. Images, text and line art can be created on any standard desktop publishing system that produces PostScript files. Completed jobs are sent to the Chromapress where the Raster Image Processor (RIP) converts the images into bitmaps which are stored internally and sent to CMYK (cyan, magenta, yellow, and black) image memory for printing on the web-fed printing engine containing two sets of four printing units (CMYK). One set of printing units is on each side of the paper, allowing for duplex printing in a single pass.

The Chromapress consists of several subsystems: a Macintosh design workstation/server; a RIP multiprocessor; an engine controller; Chromapress print engine; a paper handling system; a cooling system, and software (ChromaPost, ChromaWatch, and ChromaWrite). The work station/server allows the user through the ChromaPost software to create a job description file containing OPI links, color management, and printing parameters, binding method and other job information. The work station/server also allows the user through the ChromaWatch, and ChromaWrite software to access all press controls, and track and manage jobs.

The paper handling system holds the paper rolls (the print web) used during the operation of the Chromapress. The paper handling system is designed so that paper rolls may be changed when a different paper size or grade is needed for a new job. The handling system also conditions the paper by monitoring the moisture content. The web drive motors in the print engine tower feed the paper from the paper handling system. The print engine tower contains eight print units (four on each side of the paper web) which utilize an array of light emitting diodes (LEDs) to place an electrostatic charge to distribute fine particles of pigment onto the paper. The paper is then cooled and cut before leaving the print tower. The paper is then cut into paper sheets, separating test prints from the finished product as it leaves the printing tower.

#### *Issue:*

Is the Chromapress digital color printer classifiable as an automatic data processing (ADP) printer, or as printing machinery under the HTSUS?

#### *Law and Analysis:*

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

Legal Note 4 to Section XVI, HTSUS, states that: "[w]here a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function." The Chromapress consists of several subsystems (a Macintosh design workstation/server; a RIP multiprocessor; an engine controller; Chromapress print engine; a paper handling system; and a cooling system) intended to contribute together to the clearly defined function of printing.

It has been suggested that the Chromapress is an ADP printer classifiable under heading 8471, HTSUS. Heading 8471, HTSUS, is governed by the terms of Legal Note 5 to Chapter 84, HTSUS, which provides, in relevant part:

(B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all the following conditions:

- (a) It is of a kind solely or principally used in an automatic data processing system;
- (b) It is connectable to the central processing unit either directly or through one or more other units; and
- (c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

(D) Printers, keyboards, X-Y coordinate input devices and disk storage units which satisfy the conditions of paragraphs (B)(b) and (B)(c) above, are in all cases to be classified as units of heading 8471.

(E) Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

It has been suggested that based upon Legal Note 5(B) and 5(D), the Chromapress is an ADP printer. However, the Chromapress is more than just an ADP printer, it is an entire printing system which acts as a functional unit designed to replace off-set printing presses. Legal Note 5(E) to chapter 84 clearly states that machines performing a specific function are to be classified in the heading appropriate to their respective functions.

The issue remains which of the above legal notes determines the classification of the subject merchandise. In HQ 957491, dated July 31, 1996, Customs stated that Legal Note

5(D) must be read in light of Legal Note 5(E) to chapter 84, HTSUS. Customs concluded that "while note 5(D) negates the sole or principal use requirement when considering the classification of printers, keyboards, X-Y coordinate input devices and disk storage units, note 5(E) provides a separate prerequisite to the classification of any ADP machine and, therefore, ADP unit."

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the HTSUS. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 FR 35127, 35128 (August 23, 1989). General EN for Chapter 84, states that:

**(E) MACHINES INCORPORATING OR WORKING IN CONJUNCTION WITH AN AUTOMATIC DATA PROCESSING MACHINE AND PERFORMING A SPECIFIC FUNCTION**

In accordance with the provisions of the last paragraph of Note 5 to Chapter 84, the following classification principles should be applied in the case of a machine incorporating or working in conjunction with an automatic data processing machine, and performing a specific function:

(i) A machine incorporating an automatic data processing machine and performing a specific function other than data processing is classifiable in the heading corresponding to the function of that machine or, in the absence of a specific heading, in a residual heading, and not in heading 84.71.

(ii) **Machines presented with an automatic data processing machine and intended to work in conjunction therewith to perform a specific function** other than data processing, are to be classified as follows: the automatic data processing machine must be classified separately in heading 84.71 and the other machines in the heading corresponding to the function which they perform **unless, by application of Note 4 to Section XVI or Note 3 to Chapter 90, the whole is classified in another heading of Chapter 84, Chapter 85 or of Chapter 90 [emphasis added].**

According to the sales literature, the Chromapress allows the user "to run a wide range of printed materials. Almost any industry can use Chromapress to create short-run color documents—from real estate brochures to software documentation to full-color magazines. \* \* \* Chromapress breaks down the traditional cost and time barriers to efficient short-run color printing." On December 5, 1993, *The New York Times* published an article titled "Gutenberg Goes Digital", which states, in part, that: "[a] new generation of presses is emerging that eliminates the metal plates, creating flexibility that should allow shorter press runs and even let the publisher make on-the-fly changes. A full-color advertising circular, for example, could carry a message tailored to each individual customer. \* \* \* Two of the entrants in the plateless-press market are the E-Print 1000 by Indigo, Inc., of Rehovot, Israel, and the Chromapress by AGFA. \* \* \* In an *Print on Demand Business*, September 1995 article, "Opportunities Abound in Digital Book Production", an AGFA line manager for Chromapress stated that the Chromapress and other products based on the Xeikon DCP-1 [a competitor's product] print engine are ideally suited for book publishing because of its web-fed perfecting (duplexing) printer.

Based upon the information in the above-cited articles, we find that the Chromapress is a functional unit by application of Legal Note 4 to Section XVI and Legal Note 5(E) to chapter 84, and is performing the specific function of short-run four color printing. Heading 8443, provides for printing machinery. Therefore, we find that the Chromapress is classifiable under heading 8443, HTSUS, as printing machinery.

We note that it has been suggested that the EN 84.43 for this heading limits printing machinery to those types of machines that print by means of the type, printing blocks, plates or cylinders of heading 8442, HTSUS. However, nothing in the legal text of heading 8443 provides for such limitations. Furthermore, "[i]t must also be remembered that the tariff statutes were enacted 'not only for the present but also for the future, thereby embracing articles produced by technologies which may not have been employed or known to commerce at the time of the enactment \* \* \*.'" *Nec America, Inc. v. United States*, 8 CIT 184, 186 (1984), citing *Corporacion Sublistatica, S.A. v. United States*, 1 CIT 120, 126, 511 F.Supp. 805, 809 (1981); See also *Davis Turner & Co. v. United States*, 45 CCPA 39, 41, C.A.D. 669 (1957). See also *Simmon Omega, Inc. v. United States*, 83 Cust.Ct. 14, C.D. 4815 (1979), and *Trans-Atlantic Co. v. United States*, 471 F.2d 1397, 60 CCPA 100, C.A.D. 1088 (1973), in which the courts have held that technological advancements and "improvement in the design of an article does not militate against its continuing to be a form of the named

articles." See HQ 088024 (January 3, 1991), in which Customs held that the 3M Digital Matchprint Color Proofing System which uses digital data to produce proofs on paper stock for the printing industry was a technologically advanced, special purpose, printing proofing system and was classifiable under subheading 8443.50.50 [now 8443.59.50], HTSUS, as other printing machinery.

We further note that the merchandise includes software. Legal Note 6 to chapter 85, HTSUS, provides that "[r]ecords, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended." In HQ 950675, dated January 7, 1992, Customs held that software, whether imported in floppy disk form or downloaded onto the system's hard disk drive, was classifiable under heading 8524, HTSUS, whether or not entered with the rest of the system. Therefore, the subject software should be classified separately under heading 8524, HTSUS. At the time of entry, the proper subheading shall be determined based upon what type of media the software is recorded on and whether or not it contains sounds and images.

*Holding:*

Based upon the application of Legal Note 4 to Section XVI, the AGFA Chromapress digital color printer is classifiable under subheading 8443.59.50, HTSUS, which provides for: "[p]rinting machinery, including ink-jet printing machines, other than those of heading 8471 \* \* \*: [o]ther printing machinery: [o]ther: \* \* \*" The column one, general rate of duty is 1.3 percent *ad valorem*.

The software is classified within heading 8524, HTSUS, as recorded media. At the time of entry, the proper subheading shall be determined based upon what type of media the software is recorded on and whether or not it contains sounds and images.

MARVIN AMERNICK,  
(for John Durant, Director,  
Tariff Classification Appeals Division.)

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[ATTACHMENT G]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE  
New York, NY, August 30, 1996.  
CLA-2-85-RR:NC:108:A86557  
Category: Classification  
Tariff No. 8524.91.0070

MR. ERIK D. SMITHWEISS  
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN LLP  
245 Park Avenue  
New York, NY 10167-0002

Re: The tariff classification of software.

DEAR MR. SMITHWEISS:

In your letter dated August 9, 1996, you requested a tariff classification ruling on behalf of Basler Inc.

Your letter requests a classification ruling on software on a hard disk drive to be imported with the L4 Label Inspection System. This software is classified separately from the L4 system because of Chapter 85, Note 6, which states that media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended.

The applicable subheading for the software will be 8524.91.0070, Harmonized Tariff Schedule of the United States (HTS), which provides for records, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of chapter 37: other: for reproducing phenomena other than sound or image: other. The rate of duty will be 5.8 cents per square meter of recording surface.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Phil Carabetta at 212-466-5672.

ROGER J. SILVESTRI,

*Director,*

*National Commodity Specialist Division.*

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

*New York, NY, September 14, 1999.*

CLA-2-84:RR:NC:1:110 E86558

Category: Classification

Tariff No. 8471.50.0085 and 8524.99.4000

MR. PAUL VROMAN  
AEI CUSTOMS BROKERAGE SERVICES  
2555 20th Street  
Port Huron, MI 48060

Re: The tariff classification of a digital signage processor from various countries of origin.

DEAR MR. VROMAN:

In your letter dated August 23, 1999, on behalf of Fred Systems Ltd., you requested a tariff classification ruling.

The merchandise under consideration involves a digital signage processor (DSP). The function of the DSP is to drive a Foto Realistic Display Sign, which is a large format full-color electronic display screen.

The DSP consists of a Compaq personal computer (PC) complete with mouse and keyboard, which is purchased in Canada. The PC is manufactured in the United States by Compaq. The country of origin of the mouse and keyboard are either Malaysia or Singapore. The computer's video card is removed. It is then replaced with either 1, 2, or 3 DSP display cards that drive various displays thereby providing a graphic poster. These cards are manufactured in the United States.

If ordered, the digital signage processor also incorporates a motion video card of U.S. origin; an 8 channel video matrix switcher of Canadian origin, and/or a 100mb internal ZIP drive of Malaysian origin. Internal input and output assemblies are added, and are of U.S. origin. The actual display sign is imported separately. There is also no cathode-ray tube (CRT) monitor.

The Compaq PC contains Windows 95 or NT and a variety of software programs. All unrelated applications and programs are removed from the hard drive except for Windows and Internet Explorer. Proprietary software is then loaded into the PC. The software program is used to create and display video advertisements. The software is designed in Canada. While no other programs will be on the hard drive, the PC would still be capable of performing other data processing functions.

The finished product consists of the PC (with software, switches, ZIP drive, and/or video cards included), the keyboard and mouse, and the proprietary software loaded onto the hard drive. The DSP site player has an internal storage capacity of more than 1000 images.

The DSP does not include a monitor or printer in the shipment, which appears to be a retail set. Noting Subheading Note 1 to Chapter 84 of the HTS, which defines "systems" under 8471.49, the above shipments would be precluded from consideration under 8471.49 since they are missing an output unit, such as the monitor. Noting in part GRI-1 and GRI-3(b) to the HTS, this digital signage processor unit has the "essential character" of a digital-processing machine. The DSP would also meet Legal Note 5(A) to Chapter 84. The preloaded software would be separately classifiable under HTS heading 8524, noting Legal Note 6 to Chapter 85. Note also New York Ruling Letter D89220 of March 17, 1999.

The applicable subheading for the digital signage processor (DSP) computer system will be 8471.50.0085, Harmonized Tariff Schedule of the United States (HTS), which provides for other digital processing units other than those of subheading 8471.41 and 8471.49, whether or not containing in the same housing one or two of the following types of unit: storage units, input units, output units. The rate of duty will be free.

The applicable subheading for the preloaded software on the hard disks will be 8524.99.4000, HTS, which provides for other, other recorded media. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Arthur Brodbeck at 212-637-7019.

ROBERT B. SWIERUPSKI,

*Director,*

*National Commodity Specialist Division.*

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[ATTACHMENT 1]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

*New York, NY, July 26, 1999.*

CLA-2-84:RR:NC:1:103 E83923

Category: Classification

Tariff No. 8428.90.0090, 8441.10.0000,

8524.99.4000, and 8524.39.4000

Ms. MARILYN-JOY CERNY

GLOBAL CUSTOMS & TRADE SPECIALISTS, INC.

PO Box 102

Brewster, NY 10509

Re: The tariff classification of the AUROSYS Material Handling System from Germany.

DEAR Ms. CERNY:

In your letter dated June 24, 1999 on behalf of MAN Roland Inc. you requested a tariff classification ruling.

The AUROSYS Automatic Material Handling System is designed to provide efficient handling of paper rolls, as well as palletized newspaper inserts, printing plates and other materials, for newspaper printing presses. It is composed of a number of semi-automatic or fully automatic modules which are linked together in various configurations to provide a customized paper roll logistics system. A AUROSYS system is composed of the following units, all of which your client intends to import in a single shipment:

1. AUROcharge automatic truck unloading machine—transfers upright paper rolls or palletized inserts from a truck onto an unloading dock utilizing pneumatic slides, a walking floor, or a belt conveyor. The unloading operation can be initiated and monitored by the truck driver, thus minimizing the need for additional dock personnel.

2. AUROstore automatic high rack storage machine—consists of several blocks of steel shelving positioned in a parallel fashion, and a storage/retrieval unit. The steel shelving is a self-supporting structure which can have a height of up to 20 storage units. The storage/retrieval unit travels in the passages between the rows to load or unload the paper rolls and palletized inserts, as well as printing plates and spare parts for the printing press. Each roll or pallet contains a bar code which is registered in the stock management system using a scanner. Removal of materials is on a first in, first out basis.

3. AUROcut semi-automatic reel unwrapping station—consists basically of a frame with a lifting device and a turning unit. Two take-up rolls lift the roll from a transport device and rotate it by means of an electric motor. While rotating, the operator manu-

ally cuts off the end covers. Roll rotation is then stopped and the wrapping material is manually slit. The roll is then rotated once again, allowing the operator to pull off the wrapping material and visually inspect the roll for damage.

4. AUROport automatic reel and pallet transporter module—consists of a number of individual battery powered automated guided vehicles which move the paper rolls and pallets using a self-contained fork mechanism. The vehicles receive transport commands by radio or from guide cables running in the floor. An on-board computer stores the various routes.

5. AUROprep reel splicing preparation machine—prepares rolls of paper for splicing. In the semi-automatic version, the leading edge of the paper web is manually placed over a cutting bar and pressed against a cutting knife to produce a straight edge. An adhesive holding band is then automatically fixed to the roll and the operator attaches the leading edge of the paper web to the band. In the automatic version, suction grippers are used to lift the outer paper layer for cutting. After placing the adhesive band the roll is rotated so that its leading edge contacts the band, while the excess paper is simultaneously trimmed off.

6. AUORack automatic intermediate storage unit—ensures the availability of paper rolls and palletized newspaper inserts for continuous printing press production. Reels, prepared for splicing, and palletized inserts are placed into or removed from the unit's shelving by the AUROport AGVs. The modular shelving provides three storage levels.

7. AUROload automatic reel splicer loading machine—loads paper rolls from 350 to 1270 millimeters in diameter onto the printing press reel splicer. It utilizes a sliding platform to align the roll with the arms of the splicer, and automatically places empty roll cores into disposal bins.

8. AUROWaste automatic waste handling system—removes spoilage and general waste which accumulates in various parts of the printing plant. The waste is collected in bins, and the bins are transported by AGVs to a central waste disposal area which contains tilting devices to empty the bins. Printed spoilage is carried to the disposal area by a separate conveyor system.

9. AUROlog automatic reel and pallet management—a computer system which records all roll data and monitors the progress of rolls through the printing plant. It links together all of the individual AUROSYS system modules into a single materials supply system. Via a network, the AUROlog communicates with the central control of the printing press or with the plant's production planning system.

In addition to the above, the AUROSYS will also be imported with Windows NT software pre-loaded on a hard disk drive, as well as a back-up of the same software on CD-ROMs.

Imported merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTS) in accordance with the General Rules of Interpretation. General Rule of Interpretation 1 states in part that, for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. Note 4 to Section XVI of the HTS states:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of the section and chapter notes of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the Notes should always be consulted. See T.D. 89-80.

In discussing Note 4 to Section XVI, the ENs state:

For the purposes of this Note, the expression "intended to contribute together to a clearly defined function" covers only machines and combinations of machines essential to the performance of the function specific to the functional unit as a whole, and thus excludes machines or appliances fulfilling auxiliary functions and which do not contribute to the function of the whole.

The various components of the AUROSYS system described above, with the exception of the AUROprep, form a functional unit whose function is handling. Accordingly, the applicable subheading for the AUROSYS system, imported in a single shipment, will be

8428.90.0090, HTS, which provides for other lifting, handling, loading or unloading machinery: other machinery: other: other. The rate of duty will be free.

The AUROprep station performs an auxiliary function, cutting, and does not contribute to the function of handling performed by the balance of the AUROSYS system. Accordingly, it must be separately classified. The applicable subheading for the AUROprep station, whether imported separately or together with the balance of the AUROSYS system, will be 8441.10.0000, HTS, which provides for other machinery for making up paper pulp, paper or paperboard, including cutting machines of all kinds: cutting machines. The rate of duty will again be free.

Note 6 to Chapter 85 states:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended.

Following Note 6 to Chapter 85, the software is also separately classifiable. The applicable classification for the software which is pre-loaded on a hard disk drive will be 8524.99.4000, HTS, which provides for records, tapes and other recorded media for sound or other similarly recorded phenomena \* \* \*: other: other: other. The rate of duty will also be free. The applicable classification for the software imported on CD-ROMs will be 8524.39.4000, HTS, which provides for records, tapes and other recorded media for sound or other similarly recorded phenomena \* \* \*: discs for laser reading systems: other: for reproducing representations of instructions, data, sound, and image, recorded in a machine readable binary form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine; proprietary format recorded discs. The rate of duty will be 0.9 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Alan Horowitz at 212-637-7027.

ROBERT B. SWIERUPSKI,

*Director,*

*National Commodity Specialist Division.*

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[ATTACHMENT J]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

*Washington, DC.*

CLA-2 RR: CR: GC: 965254 TPB

Category: Classification

Tariff No. 8524.90.40

MR. JOHN S. RODE  
RODE & QUALEY  
295 Madison Ave  
New York, NY 10017

Re: Recorded Data; Hard Drive; HQ 950675 Modified.

DEAR MR. RODE:

This is in reference to HQ 950675, issued to you on January 7, 1992, in response to your letter dated October 8, 1991, requesting classification of certain automatic data processing ("ADP") pre-recorded data under the Harmonized Tariff Schedule of the United States ("HTSUS"), on behalf of Biomedical Instrumentation, Inc. We have had an opportunity to review that ruling and now find it to no longer reflects our view as to the classification of recorded data. This ruling modifies HQ 950675 to the extent noted.

*Facts:*

According to your letter, Biomedical Instrumentation, Inc., manufactures the "EPLab System" which is capable of accomplishing all of the functions of the traditional form of

electrocardiograph, i.e., measuring, displaying and recording the electrical currents which are generated in a patient's heart during an electrophysiological study.

The EPLab System utilizes proprietary data also known as "software" to analyze the recorded information and compile appropriate reports for display on the EPLab monitor, or for subsequent printing.

The data produced by Biomedical Instrumentation, Inc., will be imported either in floppy diskette form or downloaded on the hard disk drive.

*Issue:*

What is the classification of data (recorded media) in the form of floppy diskettes or when pre-loaded on a hard disk drive?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

Note 6 to Chapter 85, HTSUS, states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Media of heading 8523 or 8524 must be classified separately if it is presented with the apparatus for which it is intended. The media must also be classified separately if it is not presented with the apparatus for which it is intended.

Accordingly, the importation of floppy disks containing the EPLab System Application Program falls within Legal Note 6 to Chapter 85, regardless of whether or not they are shipped with the EPLab System (see HQ 955442, dated February 28, 1994, for a discussion on the classification of floppy disks).

We next examine the treatment of the application program for the EPLab System when recorded on the magnetic disk of the hard-disk drive unit that resides within the EPLab System.

Previously, Customs has interpreted Note 6 to Chapter 85, HTSUS, to include data that comes pre-loaded on the hard disk drive of an ADP and required that it be broken out and separately classified (see HQ 956962, dated September 13, 1994; HQ 960259, dated November 12, 1997; HQ 958808, dated May 15, 1996; HQ 957981, dated July 9, 1997; HQ 959651, dated July 9, 1997; NY B85213, dated April 23, 1997; NY A86557, dated August 30, 1996; NY E86558, dated September 14, 1999; NY D89220, dated March 17, 1999; NY E83923, dated July 26, 1999). Because there was no substantive reasoning or analysis as to this classification, Customs apparently assumed that the hard disk platters that are integrated into the hard disk drive that is installed in the central processing unit are the applicable "media" under the provision and that the hard disk drive itself is the "apparatus for which they are intended."

Customs has established that hard disk platters that are incorporated into a hard disk drive of an ADP are not separately classified because they become part of the drive itself, which is specifically provided for under heading 8471 (see HQ 083588, dated September 22, 1989; NY 807998, dated March 17, 1995). In HQ 954361, dated November 2, 1993, Customs classified hard disk drive assemblies under heading 8471.93, HTSUS, and did not separately classify the unrecorded media contained within the assemblies. Compare this treatment with HQ 953168, dated March 31, 1993, in which Customs classified separately presented hard disks, or platters, under heading 8523, HTSUS.

Because the inclusion of platters into a hard disk drive is a permanent process, they become incorporated and subsumed by the disk drive under a new classification, unlike floppy disks, diskettes, CD-ROMs and other media which are clearly removable, separate and distinct from the "apparatus for which they are intended." Thus, hard disk platters, whether recorded or unrecorded, that are incorporated into hard disk drives are not media

of either heading 8523 or 8524, HTSUS, and thus fall outside of the scope of Note 6 to Chapter 85, HTSUS.

HQ 950675 made no distinction between the data on the floppy disks and the data that resided on the hard disk drive that was installed within the data processing machine when Note 6 to Chapter 85 was applied. For the foregoing reasons, it is now Customs view that such pre-recorded data is outside of the scope of Note 6 to Chapter 85 and that it is subsumed into the system and should be classified with the data processing machine.

Although it has no bearing on Customs new view on the classification of this type of recorded media, Customs notes that on January 1, 2002, the language of Note 6 to Chapter 85 will be changed to read as follows:

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This Note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

Also changed will be the Explanatory Note to Chapter 85, General, (B) Parts. The following addition will be made to Part "(B)" on page 1443:

**(B) MEDIA PRESENTED WITH APPARATUS FOR WHICH THEY ARE INTENDED (Chapter Note 6)**

Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented together with the apparatus for which they are intended (e.g., a video cassette presented with a video cassette player). This Note does not apply, however, when the media are presented together with articles other than the apparatus for which they are intended (e.g., materials for use in instructing children in mathematics consisting of an instructional video cassette, an instructional workbook and a small calculating machine). When the media are presented with articles other than the apparatus for which they are intended, the following classification principles should be applied: (1) If the media and the other articles make up a set put up for retail sale under General Interpretative Rule 3 (b), the set should be classified by application of that Rule; or (2) If the media and the other articles do not make up a set put up for retail sale under General Interpretative Rule 3 (b), then they should be classified separately in their own appropriate headings.

The present Part "(B)" will be re-lettered as Part "(C)".

**Holding:**

For the reasons stated above, Biomedical Instrumentation, Inc., proprietary data imported in the form of separate floppy disks is classified under subheading 8524.90.40, HTSUS, while any data entered on hard disk drives incorporated into the EPLab System will be classified with that system as determined by HQ 950675.

**Effect on other Rulings:**

HQ 950675 is modified to the extent described above, i.e., the language in HQ 950675 no longer reflects our view of Legal Note 6 to Chapter 85, HTSUS.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

## [ATTACHMENT K]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR: CR: GC 965255 TPB  
Category: Classification  
Tariff No. 9010.20.60

MR. TERRY WADOWSKI  
LUMUC CORPORATION  
2380 Mississauga Road  
Mississauga, Ontario  
L5H 2L1 Canada

Re: Photocards Kiosk; Note 6 to Chapter 85; HQ 956962 modified.

DEAR MR. WADOWSKI:

This is in regard to HQ 956962, issued to you on September 13, 1994, in response to your letter dated July 15, 1994, requesting classification of Photocards Kiosks under the Harmonized Tariff Schedule of the United States (HTSUS), on behalf of Basler Inc. We have had an opportunity to review that ruling and now find it to no longer reflects our view as to the classification of the recorded media. This ruling modifies HQ 956962 to the extent noted.

*Facts:*

The merchandise at issue is a Photocards Kiosk, which is a machine that allows a customer to design a photographic business card. The Kiosk contains the following components: a Ricoh KR-10M SLR camera with the Ricoh 35-/0 mm lens; high resolution computer monitor; a UMAX flat bed scanner; a computer (486DLC-33 with 250 Mb hard disk drive) with monitor and mini-keyboard; computer speakers; touch screen; video splitter/multiplier. The Kiosk operates Canadian developed and produced data, also known as "software." The data incorporates stereo sound, recorded voice, photographic quality images and an interactive touch screen to guide the user through the design process. Data is permanently fixed in the Kiosk's hard disk drive, and is designed to work only with the Photocards Kiosk.

*Issue:*

What is the classification of data on the Photocards Kiosk hard disk drive?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

Note 6 to Chapter 85 states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Previously, Customs has interpreted Note 6 to Chapter 85, HTSUS, to include data that comes pre-loaded on the hard disk drive of an ADP and required that it be broken out and separately classified (see HQ 960259, dated November 12, 1997; HQ 958808, dated May 15, 1996; HQ 957981, dated July 9, 1997; HQ 959651, dated July 9, 1997; NY B85213, dated April 23, 1997; NY A86557, dated August 30, 1996; NY E86558, dated September 14, 1999; NY D89220, dated March 17, 1999; NY E83923, dated July 26, 1999). Because there was no substantive reasoning or analysis as to this classification, Customs apparently as-

sumed that the hard disk platters, integrated into the hard disk drive and installed in the central processing unit, are the applicable "media" under the provision and that the hard disk drive itself is the "apparatus for which they are intended."

Customs has established that hard disk platters that are incorporated into a hard disk drive of an ADP are not separately classified because they become part of the drive itself, which is specifically provided for under heading 8471 (see HQ 083588, dated September 22, 1989; NY 807998, dated March 17, 1995). In HQ 954361, dated November 2, 1993, Customs classified hard disk drive assemblies under subheading 8471.93, HTSUS, and did not separately classify the unrecorded media contained within the assemblies. Compare this treatment with HQ 953168, dated March 31, 1993, in which Customs classified separately presented hard disks, or platters, under heading 8523, HTSUS.

Because the inclusion of platters into a hard disk drive is a permanent process, they become incorporated and subsumed by the disk drive under a new classification, unlike floppy disks, diskettes CD-ROMs and other media which are clearly removable, separate and distinct from the "apparatus for which they are intended." Thus, hard disk platters, whether recorded or unrecorded, that are incorporated into hard disk drives are not media of either heading 8523 or 8524, HTSUS, and thus fall outside of the scope of Note 6 to Chapter 85, HTSUS.

HQ 956962 ruled that the proprietary recorded media on the Kiosk's hard disk drive had to be broken out and separately classified from the rest of the Kiosk because of Note 6 to Chapter 85, HTSUS. As explained above, it is now Customs view that data on a hard disk drive that is permanently affixed to an automatic data processing machine falls outside of the scope of the Note.

Although it has no bearing on Customs new view on the classification of this type of recorded media, Customs notes that on January 1, 2002, the language of Note 6 to Chapter 85 will be changed to read as follows:

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This Note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

Also changed will be the Explanatory Note to Chapter 85, General, (B) Parts. The following addition will be made to Part "(B)" on page 1443:

(B) MEDIA PRESENTED WITH APPARATUS FOR WHICH THEY ARE INTENDED (Chapter Note 6)

Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented together with the apparatus for which they are intended (e.g., a video cassette presented with a video cassette player). This Note does not apply, however, when the media are presented together with articles other than the apparatus for which they are intended (e.g., materials for use in instructing children in mathematics consisting of an instructional video cassette, an instructional workbook and a small calculating machine). When the media are presented with articles other than the apparatus for which they are intended, the following classification principles should be applied: (1) If the media and the other articles make up a set put up for retail sale under General Interpretative Rule 3 (b), the set should be classified by application of that Rule; or (2) If the media and the other articles do not make up a set put up for retail sale under General Interpretative Rule 3 (b), then they should be classified separately in their own appropriate headings.

The present Part "(B)" will be re-lettered as Part "(C)".

#### *Holding:*

For the reasons stated above, data entered on hard disk drives incorporated into the Photocards Kiosk will be classified with that system under subheading 9010.20.60, HTSUS.

#### *Effect on other Rulings:*

HQ 956962 is modified to the extent described above, i.e., the language in HQ 956962 no longer reflects our view of Legal Note 6 to Chapter 85, HTSUS.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

## [ATTACHMENT L]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR: CR: GC 965256 TPB  
Category: Classification  
Tariff No. 9026.80.60 and 9032.89.60

MR. PAUL S. ANDERSON  
SONNEBERG & ANDERSON  
200 South Wacker Drive  
Chicago, IL 60606

Re: Gob Image Analyzing System; Recorded Media; Note 6 to Chapter 85; HQ 960259 Modified.

DEAR MR. ANDERSON:

This is in reference to HQ 960259, issued to you on November 12, 1997, in response to your letters dated February 19 and September 2, 1997, requesting classification of a Gob Image Analyzing System under the Harmonized Tariff Schedule of the United States ("HTSUS"), on behalf of GeDevelop, Inc. We have had an opportunity to review that ruling and now find it to no longer reflects our view as to the classification of the software. This ruling modifies HQ 960259 to the extent noted.

*Facts:*

According to your letter, the merchandise consists of a Gob Image Analyzing System ("GIA System"), which is composed of a Gob Image Analyzer ("GIA") and a Gob Weight Controller ("GWC"). You claimed that the primary function of the GIA System is to monitor and control the flow of molten glass to ensure that the optimal amount of molten glass is poured into a mold, which will shape the end product.

A gob is a small amount of molten glass, which is allowed to fall from the hearth to the molding machine, which will shape the molten glass into a container. The GIA System measures the temperature, width and speed of the gob as it is falling. From this data, it calculates the gob's weight and shape. The GIA System will then compare the gob's weight, shape and temperature to the prescribed parameters. If a gob's weight falls outside prescribed parameters, the GIA System will alter the flow of the molten glass by adjusting the tube height. This will, in turn, affect the weight of subsequent gobs.

The GIA System consists of four main components: a camera consisting of sensors with a charge-coupled device ("CCD") array housed in an aluminum case; a computer dedicated for use in the GIA System which includes a central processing unit ("CPU"), software, system disk, disk drive, monitor and keyboard; a scale used to calibrate the GIA; and a gob-shape-change switch.

You requested that we determine the correct classification of the GIA System, and the classification of the GIA and GWC as if they were imported separately. You also asked whether the recorded media in the computer of the GIA and GIA System is separately classifiable under heading 8524, HTSUS.

This ruling will deal only with the issue of the recorded data, or "software". The classification of the GIA System and the GIA and GWC as if imported separately were determined in HQ 960259, and will remain unchanged by this ruling.

*Issue:*

What is the classification of recorded data on the hard disk drive of the GIA System and GIA?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the interna-

tional level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

Note 6 to Chapter 85 states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Previously, Customs has interpreted Note 6 to Chapter 85, HTSUS, to include data that comes pre-loaded on the hard disk drive of an ADP and required that it be broken out and separately classified (see HQ 956962, dated September 13, 1994; HQ 958808, dated May 15, 1996; HQ 957981, dated July 9, 1997; HQ 959651, dated July 9, 1997; NY B85213, dated April 23, 1997; NY A86557, dated August 30, 1996; NY E86558, dated September 14, 1999; NY E83923, dated July 26, 1999). Because there was no substantive reasoning or analysis as to this classification, Customs apparently assumed that the hard disk platters that are integrated into the hard disk drive that is installed in the central processing unit are the applicable "media" under the provision and that the hard disk drive itself is the "apparatus for which they are intended."

Customs has established that hard disk platters that are incorporated into a hard disk drive of an ADP are not separately classified because they become part of the drive itself, which is specifically provided for under heading 8471 (see HQ 083588, dated September 22, 1989; NY 807998, dated March 17, 1995). In HQ 954361, dated November 2, 1993, Customs classified hard disk drive assemblies under heading 8471.93, HTSUS, and did not separately classify the unrecorded media contained within the assemblies. Compare this treatment with HQ 953168, dated March 31, 1993, in which Customs classified separately presented hard disks, or platters, under heading 8523, HTSUS.

Because the inclusion of platters into a hard disk drive is a permanent process, they become incorporated and subsumed by the disk drive under a new classification, unlike floppy disks, diskettes CD-ROMs and other media which are clearly removable, separate and distinct from the "apparatus from which they are intended." Thus, hard disk platters, whether recorded or unrecorded, that are incorporated into hard disk drives are not media of either heading 8523 or 8524, HTSUS, and thus fall outside of the scope of Note 6 to Chapter 85, HTSUS.

In applying its previous interpretation of Note 6 to Chapter 85, HTSUS, HQ 960259 held that any recorded data was media in the computer of the GIA or the GIA System and was to be separately classified under heading 8524, HTSUS. As explained above, this is no longer Customs view of the proper interpretation to the Note.

Although it has no bearing on Customs new view on the classification of this type of recorded media, Customs notes that on January 1, 2002, the language of Note 6 to Chapter 85 will be changed to read as follows:

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This Note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

Also changed will be the Explanatory Note to Chapter 85, General, (B) Parts. The following addition will be made to Part "(B)" on page 1443:

(B) MEDIA PRESENTED WITH APPARATUS FOR WHICH THEY ARE INTENDED (Chapter Note 6)

Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented together with the apparatus for which they are intended (e.g., a video cassette presented with a video cassette player). This Note does not apply, however, when the media are presented together with articles other than the apparatus for which they are intended (e.g., materials for use in instructing children in mathematics consisting of an instructional video cassette, an instructional workbook and a small calculating machine). When the media are presented with articles other than the apparatus for which they are intended, the following classification principles should be applied: (1) If the media and the other articles make up a set put up for retail sale under General Interpretative Rule 3 (b), the set should be classified by application of that Rule; or (2) If the media and the other articles do not make up a set put up for retail sale under General Interpretative Rule 3 (b), then they should be classified separately in their own appropriate headings.

The present Part "(B)" will be re-lettered as Part "(C)".

*Holding:*

For the reasons stated above, recorded data entered on hard disk drives incorporated into the GIA System and GIA will be classified with those digital machines.

*Effect on other Rulings:*

HQ 960259 is modified to the extent described above, i.e., the language in HQ 960259 no longer reflects our view of Legal Note 6 to Chapter 85, HTSUS.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

## [ATTACHMENT M]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR: CR: GC 965271 TPB  
Category: Classification  
Tariff No. 9031.40.80

PORT DIRECTOR  
U.S. CUSTOMS SERVICE  
10 Causeway Street  
Room 603  
Boston, MA 02222-1059

Re: Protest 0401-95-100749; Scanning Laser Vibrometers; Recorded Data; Chapter 85, Note 6; HQ 958808 Modified.

## DEAR PORT DIRECTOR:

This is in reference to HQ 958808, issued on May 15, 1996, regarding Protest 0401-95-100749, which concerned the classification of certain Polytech PI's Scanning Laser Vibrometers under the Harmonized Tariff Schedule of the United States ("HTSUS"). We have had an opportunity to review that ruling and now find it to no longer reflects our view as to the classification of the recorded media. This ruling modifies HQ 958808 to the extent noted.

*Facts:*

According to information submitted by the Protestant, the PSV-100-US Scanning Laser Vibrometers are used for monitoring and measuring vibrations in a variety of articles, including but not limited to, machinery, automobiles, aerospace components and domestic appliances. The vibrometers measure the velocity and absolute displacement of a point on a vibrating structure in an entirely, non-contact manner.

The vibrometers consist of a data management subsystem, which consists of a high performance personal computer ("PC") with high resolution color monitor, the OFV-302-R laser-based sensor head and vibrometer controller, which also provides instrument control and data analysis capabilities. The PC is pre-loaded with proprietary data also referred to as "software."

*Issue:*

What is the classification of the recorded data on the hard disk drive of the Scanning Laser Vibrometers PC?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1,

and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

Note 6 to Chapter 85, HTSUS, states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Previously, Customs has interpreted Note 6 to Chapter 85, HTSUS, to include data that comes pre-loaded on the hard disk drive of an ADP and required that it be broken out and separately classified (see HQ 956962, dated September 13, 1994; HQ 960259, dated November 12, 1997; HQ 957981, dated July 9, 1997; HQ 959651, dated July 9, 1997; NY B85213, dated April 23, 1997; NY A86557, dated August 30, 1996; NY E86558, dated September 14, 1999; NY E83923, dated July 26, 1999). Because there was no substantive reasoning or analysis as to this classification, Customs apparently assumed that the hard disk platters that are integrated into the hard disk drive that is installed in the central processing unit are the applicable "media" under the provision and that the hard disk drive itself is the "apparatus for which they are intended."

Customs has established that hard disk platters that are incorporated into a hard disk drive of an ADP are not separately classified because they become part of the drive itself, which is specifically provided for under heading 8471 (see HQ 083588, dated September 22, 1989; NY 807998, dated March 17, 1995). In HQ 954361, dated November 2, 1993, Customs classified hard disk drive assemblies under heading 8471.93, HTSUS, and did not separately classify the unrecorded media contained within the assemblies. Compare this treatment with HQ 953168, dated March 31, 1993, in which Customs classified separately presented hard disks, or platters, under heading 8523, HTSUS.

Because the inclusion of platters into a hard disk drive is a permanent process, they become incorporated and subsumed by the disk drive under a new classification, unlike floppy disks, diskettes, CD-ROMs and other media which are clearly removable, separate and distinct from the "apparatus from which they are intended." Thus, hard disk platters, whether recorded or unrecorded, that are incorporated into hard disk drives are not media of either heading 8523 or 8524, HTSUS, and thus fall outside of the scope of Note 6 to Chapter 85, HTSUS.

HQ 958808 ruled that the proprietary software that came pre-loaded on to the vibrometers hard disk drive prior to its importation had to be broken out and separately classified because of Note 6 to Chapter 85, HTSUS. As explained above, it is now Customs view that recorded data on a hard disk drive that is permanently affixed to an automatic data processing machine falls outside of the scope of the Note.

Although it has no bearing on Customs new view on the classification of this type of recorded media, Customs notes that on January 1, 2002, the language of Note 6 to Chapter 85 will be changed to read as follows:

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This Note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

Also changed will be the Explanatory Note to Chapter 85, General, (B) Parts. The following addition will be made to Part "(B)" on page 1443:

(B) MEDIA PRESENTED WITH APPARATUS FOR WHICH THEY ARE INTENDED (Chapter Note 6)

Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented together with the apparatus for which they are intended (e.g., a video cassette presented with a video cassette player). This Note does not apply, however, when the media are presented together with articles other than the apparatus for which they are intended (e.g., materials for use in instructing children in mathematics consisting of an instructional video cassette, an instructional workbook and a small calculating machine). When the media are presented with articles other than the apparatus for which they are intended, the following classification principles should be applied: (1) If the media and the other articles make up a set put up for retail

sale under General Interpretative Rule 3 (b), the set should be classified by application of that Rule; or (2) If the media and the other articles do not make up a set put up for retail sale under General Interpretative Rule 3 (b), then they should be classified separately in their own appropriate headings.

The present Part "(B)" will be re-lettered as Part "(C)".

*Holding:*

For the reasons stated above, the vibrometers' recorded data entered on hard disk drives incorporated into the vibrometers will be classified with that PC. The PSV-100-US Scanning Laser Vibrometers will remain in subheading 9031.40.80, HTSUS, as per HQ 958808.

*Effect on other Rulings:*

HQ 958808 is modified to the extent described above, i.e., the language in HQ 958808 no longer reflects our view of Legal Note 6 to Chapter 85, HTSUS.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

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[ATTACHMENT N]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR: CR: GC 965272 TPB  
Category: Classification  
Tariff No. 8443.59.50

MR. R. KEVIN WILLIAMS  
O'DONNELL, BYRNE & WILLIAMS  
20 North Wacker Drive  
Suite 3710  
Chicago, IL 60606

Re: Digital Color Printers; Pre-loaded Software; HQ 957981 Modified.

DEAR MR. WILLIAMS:

This is in reference to HQ 957981, issued to you on July 9, 1997, in response to your letter dated April 27, 1995, requesting classification of the Xeikon XP-1 digital color printers ("DCP-1") under the Harmonized Tariff Schedule of the United States ("HTSUS"), on behalf of AM Multigraphics. We have had an opportunity to review that ruling and now find it to no longer reflects our view as to the classification of the data, or "software." This ruling modifies HQ 957981 to the extent noted.

*Facts:*

According to your letter, the DCP-1 is a 4-color digital printer specially designed for short-run, full color applications. Instead of requiring the costly intermediate steps, such as mechanical art, film and plate-making, commonly associated with color printing, the DCP-1 prints directly from digital data to paper. Images, text and line art can be created on any standard desktop publishing system that produces PostScript Level 2 output. The DCP-1 is an example of a new type of commercial product known in the industry as short-run printing with digital presses or "digital print-on-demand." Completed jobs are sent digitally to the DCP-1 where they are stored internally in memory for printing on the web-fed printing engine.

The digital system, which controls the operation of the DCP-1, consists of two control computers (the host and the print engine supervisor), and three functional subsystems (the host interface, the imaging control system and the instrumentation control system). Both computers are dedicated solely to operating the DCP-1 system and are incapable of accepting additional "software" other than that provided with the DCP-1.

*Issue:*

What is the classification of the recorded data on the hard disk drive of the Xeon DCP-1 control computers?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

Note 6 to Chapter 85, HTSUS, states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Previously, Customs has interpreted Note 6 to Chapter 85, HTSUS, to include data that comes pre-loaded on the hard disk drive of an ADP and required that it be broken out and separately classified (see HQ 956962, dated September 13, 1994; HQ 960259, dated November 12, 1997; HQ 959651, dated July 9, 1997; NY B85213, dated April 23, 1997; NY A86557, dated August 30, 1996; NY E86558, dated September 14, 1999; NY E83923, dated July 26, 1999). Because there was no substantive reasoning or analysis as to this classification, Customs apparently assumed that the hard disk platters that are integrated into the hard disk drive that is installed in the central processing unit are the applicable "media" under the provision and that the hard disk drive itself is the "apparatus for which they are intended."

Customs has established that hard disk platters that are incorporated into a hard disk drive of an ADP are not separately classified because they become part of the drive itself, which is specifically provided for under heading 8471 (see HQ 083588, dated September 22, 1989; NY 807998, dated March 17, 1995). In HQ 954361, dated November 2, 1993, Customs classified hard disk drive assemblies under heading 8471.93, HTSUS, and did not separately classify the unrecorded media contained within the assemblies. Compare this treatment with HQ 953168, dated March 31, 1993, in which Customs classified separately presented hard disks, or platters, under heading 8523, HTSUS.

Because the inclusion of platters into a hard disk drive is a permanent process, they become incorporated and subsumed by the disk drive under a new classification, unlike floppy disks, diskettes CD-ROMs and other media which are clearly removable, separate and distinct from the "apparatus from which they are intended." Thus, hard disk platters, whether recorded or unrecorded, that are incorporated into hard disk drives are not media of either heading 8523 or 8524, HTSUS, and thus fall outside of the scope of Note 6 to Chapter 85, HTSUS.

HQ 957981 ruled that any recorded media on the control computers prior to its importation had to be broken out and separately classified because of Note 6 to Chapter 85, HTSUS. Although it made no determination as to the classification of the "software" in the ruling, it instructed that the proper subheading classification of the recorded media under heading 8524, HTSUS, would be determined at the time of importation based upon what type of media the "software" is recorded on and whether or not it contains sound and images. That reference in HQ 957981 should be disregarded. As explained above, it is now Customs view that recorded media on a hard disk drive that is permanently affixed to an automatic data processing machine falls outside of the scope of the Note.

Although it has no bearing on Customs new view on the classification of this type of recorded media, Customs notes that on January 1, 2002, the language of Note 6 to Chapter 85 will be changed to read as follows:

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This Note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

Also changed will be the Explanatory Note to Chapter 85, General, (B) Parts. The following addition will be made to Part "(B)" on page 1443:

(B) MEDIA PRESENTED WITH APPARATUS FOR WHICH THEY ARE INTENDED (Chapter Note 6)

Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented together with the apparatus for which they are intended (e.g., a video cassette presented with a video cassette player). This Note does not apply, however, when the media are presented together with articles other than the apparatus for which they are intended (e.g., materials for use in instructing children in mathematics consisting of an instructional video cassette, an instructional workbook and a small calculating machine). When the media are presented with articles other than the apparatus for which they are intended, the following classification principles should be applied: (1) If the media and the other articles make up a set put up for retail sale under General Interpretative Rule 3 (b), the set should be classified by application of that Rule; or (2) If the media and the other articles do not make up a set put up for retail sale under General Interpretative Rule 3 (b), then they should be classified separately in their own appropriate headings.

The present Part "(B)" will be re-lettered as Part "(C)".

*Holding:*

For the reasons stated above, the recorded data on hard disk drives incorporated into the control computers will be classified with that system. The Xeikon DCP-1 digital color printer will remain classified in subheading 8443.59.50, HTSUS, as per HQ 957981.

*Effect on other Rulings:*

HQ 957981 is modified to the extent described above, i.e., the language in HQ 957981 no longer reflects our view of Legal Note 6 to Chapter 85, HTSUS.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

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[ATTACHMENT O]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR: CR: GC 965273 TPB  
Category: Classification  
Tariff No. 8443.59.50

MR. CHARLES SPOTO  
FRITZ COMPANIES, INC.  
150-20 132<sup>nd</sup> Avenue  
Jamaica, NY 11430

Re: Digital Color Printers; Recorded Data; HQ 959651 Modified.

DEAR MR. SPOTO:

This is in reference to HQ 959651, issued to you on July 9, 1997, in response to your letter dated January 18, 1996, requesting classification of the AGFA Chromapress digital color printing system ("Chromapress") under the Harmonized Tariff Schedule of the United States ("HTSUS"), on behalf of Bayer Corporation-AGFA Division. We have had an opportunity to review that ruling and now find it to no longer reflects our view as to the classification of the recorded data. This ruling modifies HQ 959651 to the extent noted.

*Facts:*

According to your letter, the Chromapress is a 4-color digital printer used in the graphic arts field for short-run, full color applications at high speeds. Instead of requiring the cost-

ly intermediate steps, such as mechanical art, film and plate-making, commonly associated with color printing, the Chromapress prints directly from digital data to paper. Images, text and line art can be created on any standard desktop publishing system that produces PostScript Level files. The Chromapress is an example of a new type of commercial product known in the industry as short-run printing with digital presses or "digital print-on-demand." Completed jobs are sent digitally to the Chromapress where they are stored internally in memory for printing on the web-fed printing engine.

The Chromapress consists of several subsystems: a Macintosh design workstation/server; a RIP multiprocessor; an engine controller; Chromapress print engine; a paper handling system; a cooling system and software (ChromaPost, ChromaWatch and ChromaWrite). The workstation/server allows the user through the ChromaPost software to create a job description file containing the OPI links, color management, printing parameters, binding method and other job information. The workstation/server also allows the user through the ChromaWatch and ChromaWrite software to access all press controls and track and manage jobs.

*Issue:*

What is the classification of the recorded media on the hard disk drive of the Xeikon DCP-1 control computers?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

Note 6 to Chapter 85, HTSUS, states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Previously, Customs has interpreted Note 6 to Chapter 85, HTSUS, to include data that comes pre-loaded on the hard disk drive of an ADP and required that it be broken out and separately classified (see HQ 956962, dated September 13, 1994; HQ 960259, dated November 12, 1997; NY B85213, dated April 23, 1997; NY A86557, dated August 30, 1996; NY E86558, dated September 14, 1999; NY E83923, dated July 26, 1999). Because there was no substantive reasoning or analysis as to this classification, Customs apparently assumed that the hard disk platters that are integrated into the hard disk drive that is installed in the central processing unit are the applicable "media" under the provision and that the hard disk drive itself is the "apparatus for which they are intended."

Customs has established that hard disk platters that are incorporated into a hard disk drive of an ADP are not separately classified because they become part of the drive itself, which is specifically provided for under heading 8471 (see HQ 083588, dated September 22, 1989; NY 807998, dated March 17, 1995). In HQ 954361, dated November 2, 1993, Customs classified hard disk drive assemblies under heading 8471.93, HTSUS, and did not separately classify the unrecorded media contained within the assemblies. Compare this treatment with HQ 953168, dated March 31, 1993, in which Customs classified separately presented hard disks, or platters, under heading 8523, HTSUS.

Because the inclusion of platters into a hard disk drive is a permanent process, they become incorporated and subsumed by the disk drive under a new classification, unlike floppy disks, diskettes CD-ROMs and other media which are clearly removable, separate and distinct from the "apparatus from which they are intended." Thus, hard disk platters, whether recorded or unrecorded, that are incorporated into hard disk drives are not media of either heading 8523 or 8524, HTSUS, and thus fall outside of the scope of Note 6 to Chapter 85, HTSUS.

In HQ 959651, Customs ruled that any recorded media on the control computers prior to its importation had to be broken out and separately classified because of Note 6 to Chap-

ter 85, HTSUS. Although it made no determination as to the classification of the "software" in the ruling, it instructed that the proper subheading classification of the recorded media under heading 8524, HTSUS, would be determined at the time of importation based upon what type of media the "software" is recorded on and whether or not it contains sound and images. That reference in HQ 957981 should be disregarded. As explained above, it is now Customs view that recorded data on a hard disk drive that is permanently affixed to an automatic data processing machine falls outside of the scope of the Note. However, any software that comes on floppy disks, diskettes, CD-ROMs, or other media covered by Note 6 is still separately classifiable according to the terms of the Note.

Although it has no bearing on Customs new view on the classification of the above recorded data, Customs notes that on January 1, 2002, the language of Note 6 to Chapter 85 will be changed to read as follows:

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This Note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

Also changed will be the Explanatory Note to Chapter 85, General, (B) Parts. The following addition will be made to Part "(B)" on page 1443:

(B) MEDIA PRESENTED WITH APPARATUS FOR WHICH THEY ARE INTENDED (Chapter Note 6)

Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented together with the apparatus for which they are intended (e.g., a video cassette presented with a video cassette player). This Note does not apply, however, when the media are presented together with articles other than the apparatus for which they are intended (e.g., materials for use in instructing children in mathematics consisting of an instructional video cassette, an instructional workbook and a small calculating machine). When the media are presented with articles other than the apparatus for which they are intended, the following classification principles should be applied: (1) If the media and the other articles make up a set put up for retail sale under General Interpretative Rule 3 (b), the set should be classified by application of that Rule; or (2) If the media and the other articles do not make up a set put up for retail sale under General Interpretative Rule 3 (b), then they should be classified separately in their own appropriate headings.

The present Part "(B)" will be re-lettered as Part "(C)".

#### *Holding:*

For the reasons stated above, the recorded data entered on hard disk drives incorporated into the control computers will be classified with that system. The AGFA Chromapress digital color printing system will remain classified in subheading 8443.59.50, HTSUS, as per HQ 959651.

#### *Effect on other Rulings:*

HQ 959651 is modified to the extent described above, i.e., the language in HQ 959651 no longer reflects our view of Legal Note 6 to Chapter 85, HTSUS.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

[ATTACHMENT P]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR: CR: GC 965276 TPB  
Category: Classification  
Tariff No. 9031.49.80

MR. ERIK D. SMITHWEISS  
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN LLP  
245 Park Avenue  
New York, NY 10167-0002

Re: Pre-loaded Data; NY A86557 Revoked.

DEAR MR. SMITHWEISS:

This is in reference to NY A86557, issued to you on August 30, 1996, in response to your letter dated August 9, 1996, requesting classification of certain automatic data processing ("ADP") data, also referred to as "software" under the Harmonized Tariff Schedule of the United States ("HTSUS"), on behalf of Basler Inc. We have had an opportunity to review that ruling and now find it to no longer reflects our view as to the recorded data that is permanently affixed to the hard drive. For the reasons stated below, this ruling revokes NY A86557.

*Facts:*

According to your letter, the merchandise consists of an L4 "label inspection system" and accompanying proprietary software. The L4 label inspection system is used during the manufacture of compact disks ("CDs") to inspect the label affixed to the CD for errors or other defects. If an error is discovered, the L4 notifies a host computer, which either removes the CD with the defective label from the assembly line, or shuts down the assembly if a repetitive defect is found. The L4 has the following principal components: 1) control computer, 2) control panel, 3) signal converter, and 4) sensor unit.

The control panel has a hard disk which is pre-loaded with the manufacturer's proprietary data, or "software." The "software" is specifically designed for the L4 system. The control computer is a PC compatible computer operating in MS/DOS. Using the L4 "software," the computer controls the inspection process, evaluates data and exchanges data with the host machine.

*Issue:*

What is the classification of the recorded data on the hard disk drive?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

Note 6 to Chapter 85 states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Previously, Customs has interpreted Note 6 to Chapter 85, HTSUS, to include data that comes pre-loaded on the hard disk drive of an ADP and required that it be broken out and separately classified (see HQ 956962, dated September 13, 1994; HQ 960259, dated November 12, 1997; HQ 958808, dated May 15, 1996; HQ 957981, dated July 9, 1997; HQ 959651, dated July 9, 1997; NY E86558, dated September 14, 1999; NY E83923, dated July

26, 1999). Because there was no substantive reasoning or analysis as to this classification, Customs apparently assumed that the hard disk platters that are integrated into the hard disk drive that is installed in the central processing unit are the applicable "media" under the provision and that the hard disk drive itself is the "apparatus for which they are intended."

Customs has established that hard disk platters that are incorporated into a hard disk drive of an ADP are not separately classified because they become part of the drive itself, which is specifically provided for under heading 8471 (see HQ 083588, dated September 22, 1989; NY 807998, dated March 17, 1995). In HQ 954361, dated November 2, 1993, Customs classified hard disk drive assemblies under heading 8471.93, HTSUS, and did not separately classify the unrecorded media contained within the assemblies. Compare this treatment with HQ 953168, dated March 31, 1993, in which Customs classified separately presented hard disks, or platters, under heading 8523, HTSUS.

Because the inclusion of platters into a hard disk drive is a permanent process, they become incorporated and subsumed by the disk drive under a new classification, unlike floppy disks, diskettes CD-ROMs and other media which are clearly removable, separate and distinct from the "apparatus from which they are intended." Thus, hard disk platters, whether recorded or unrecorded, that are incorporated into hard disk drives are not media of either heading 8523 or 8524, HTSUS, and thus fall outside of the scope of Note 6 to Chapter 85, HTSUS.

In NY A86557, Customs held that data that comes pre-loaded on the hard disk drive of the computer was within the scope to Note 6 of Chapter 85 and had to be broken out and classified separately from the system. As explained above, it is now Customs view that such recorded data is subsumed into the system and is classified with the data processing machine.

In your letter, you indicated that you believed that the L4 system would be classified as an optical measuring of checking instrument under subheading 9031.49.80, HTSUS. It is not required that recorded media on the hard drive of this system be separately classified, as Customs no longer believes that Note 6 to Chapter 85 applies to this type of recorded media. Thus the software on the hard disk drive of the L4 system would be classified with that system.

Although it has no bearing on Customs new view on the classification of this type of recorded data, Customs notes that on January 1, 2002, the language of Note 6 to Chapter 85 will be changed to read as follows:

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This Note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

Also changed will be the Explanatory Note to Chapter 85, General, (B) Parts. The following addition will be made to Part "(B)" on page 1443:

(B) MEDIA PRESENTED WITH APPARATUS FOR WHICH THEY ARE INTENDED (Chapter Note 6)

Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented together with the apparatus for which they are intended (e.g., a video cassette presented with a video cassette player). This Note does not apply, however, when the media are presented together with articles other than the apparatus for which they are intended (e.g., materials for use in instructing children in mathematics consisting of an instructional video cassette, an instructional workbook and a small calculating machine). When the media are presented with articles other than the apparatus for which they are intended, the following classification principles should be applied: (1) If the media and the other articles make up a set put up for retail sale under General Interpretative Rule 3 (b), the set should be classified by application of that Rule; or (2) If the media and the other articles do not make up a set put up for retail sale under General Interpretative Rule 3 (b), then they should be classified separately in their own appropriate headings.

The present Part "(B)" will be re-lettered as Part "(C)".

#### *Holding:*

For the reasons stated above, data, or "software" entered on hard disk drives incorporated into the L4 system will be classified with that system.

*Effect on other Rulings:*

NY A86557 is revoked. NY A86557 no longer reflects Customs' view of Legal Note 6 to Chapter 85, HTSUS.

JOHN DURANT,  
*Director,*  
*Commercial Rulings Division.*

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[ATTACHMENT Q]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
Washington, DC.  
CLA-2 RR: CR: GC 965277 TPB  
Category: Classification  
Tariff No. 8471.50.00

MR. PAUL VROMAN  
AEI CUSTOMS BROKERAGE SERVICES  
2555 20<sup>th</sup> Street  
Port Huron, MI 48060

Re: Digital Signage Processor; Recorded Data; NY E86558 Modified.

DEAR MR. VROMAN:

This is in reference to NY E86558, issued to you on September 14, 1999, in response to your letter dated August 23, 1999, requesting classification of a digital signage processor under the Harmonized Tariff Schedule of the United States ("HTSUS"), on behalf of Fred Systems, Ltd. We have had an opportunity to review that ruling and now find it to no longer reflects our view as to the classification of the recorded data. This ruling modifies NY E86558 to the extent noted.

*Facts:*

According to your letter, the merchandise under consideration involves a digital signage processor ("DSP"). The function of the DSP is to drive a Foto Realistic Display Sign, which is a large format full-color electronic display screen.

NY E86558 states that the DSP consists of a Compaq personal computer ("PC") complete with mouse and keyboard, which is purchased in Canada. The PC contains Windows 95 or NT and a variety of programs. All unrelated applications and programs are removed from the hard drive except for Windows and Internet Explorer. Proprietary data, also referred to as "software," is then loaded into the PC. The "software" program is used to create and display video advertisements.

*Issue:*

What is the classification of the recorded data on the hard disk drive of the DSP?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

Note 6 to Chapter 85, HTSUS, states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Previously, Customs has interpreted Note 6 to Chapter 85, HTSUS, to include data that comes pre-loaded on the hard disk drive of an ADP and required that it be broken out and separately classified (see HQ 956962, dated September 13, 1994; HQ 960259, dated November 12, 1997; NY A86557, dated August 30, 1996; NY E86558, dated September 14, 1999; NY E83923, dated July 26, 1999). Because there was no substantive reasoning or analysis as to this classification, Customs apparently assumed that the hard disk platters that are integrated into the hard disk drive that is installed in the central processing unit are the applicable "media" under the provision and that the hard disk drive itself is the "apparatus for which they are intended."

Customs has established that hard disk platters that are incorporated into a hard disk drive of an ADP are not separately classified because they become part of the drive itself, which is specifically provided for under heading 8471 (see HQ 083588, dated September 22, 1989; NY 807998, dated March 17, 1995). In HQ 954361, dated November 2, 1993, Customs classified hard disk drive assemblies under heading 8471.93, HTSUS, and did not separately classify the unrecorded media contained within the assemblies. Compare this treatment with HQ 953168, dated March 31, 1993, in which Customs classified separately presented hard disks, or platters, under heading 8523, HTSUS.

Because the inclusion of platters into a hard disk drive is a permanent process, they become incorporated and subsumed by the disk drive under a new classification, unlike floppy disks, diskettes CD-ROMs and other media which are clearly removable, separate and distinct from the "apparatus for which they are intended." Thus, hard disk platters, whether recorded or unrecorded, that are incorporated into hard disk drives are not media of either heading 8523 or 8524, HTSUS, and thus fall outside of the scope of Note 6 to Chapter 85, HTSUS.

NY E86558 ruled that any recorded data on the hard disk drive of the DSP, i.e. the operating system and proprietary software, would be separately classified by virtue of Note 6 to Chapter 85, HTSUS. As explained above, it is now Customs view that recorded data that comes pre-loaded on a hard disk drive that is permanently affixed to an automatic data processing machine falls outside of the scope of the Note.

Although it has no bearing on Customs new view on the classification of this type of recorded data, Customs notes that on January 1, 2002, the language of Note 6 to Chapter 85 will be changed to read as follows:

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This Note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

Also changed will be the Explanatory Note to Chapter 85, General, (B) Parts. The following addition will be made to Part "(B)" on page 1443:

(B) MEDIA PRESENTED WITH APPARATUS FOR WHICH THEY ARE INTENDED (Chapter Note 6)

Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented together with the apparatus for which they are intended (e.g., a video cassette presented with a video cassette player). This Note does not apply, however, when the media are presented together with articles other than the apparatus for which they are intended (e.g., materials for use in instructing children in mathematics consisting of an instructional video cassette, an instructional workbook and a small calculating machine). When the media are presented with articles other than the apparatus for which they are intended, the following classification principles should be applied: (1) If the media and the other articles make up a set put up for retail sale under General Interpretative Rule 3 (b), the set should be classified by application of that Rule; or (2) If the media and the other articles do not make up a set put up for retail sale under General Interpretative Rule 3 (b), then they should be classified separately in their own appropriate headings.

The present Part "(B)" will be re-lettered as Part "(C)".

#### *Holding:*

For the reasons stated above, the recorded data on hard disk drives incorporated into the DSP will be classified with that system. The classification of the DSP will remain in the heading determined in NY E86558.

*Effect on other Rulings:*

NY E86558 is modified to the extent described above, i.e., the language in NY E86558 no longer reflects our view of Legal Note 6 to Chapter 85, HTSUS.

JOHN DURANT,  
*Director,*  
*Commercial Rulings Division.*

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[ATTACHMENT R]

DEPARTMENT OF THE TREASURY.

U.S. CUSTOMS SERVICE.

Washington, DC.

CLA-2 RR: CR: GC 965279 TPB

Category: Classification

Tariff No. 8428.90.00,

8441.10.00, and 8524.39.4000

Ms. MARILYN-JOY CERNY

GLOBAL CUSTOMS & TRADE SPECIALISTS, INC.

P.O. Box 102

Brewster, NY 10509

Re: AUROSYS Material Handling System; Recorded Data; NY E83923 Modified.

DEAR MR. CERNY:

This is in reference to NY E83923, issued to you on July 26, 1999, in response to your letter dated June 24, 1999, requesting classification of the AUROSYS Automatic Material Handling System ("AUROSYS") under the Harmonized Tariff Schedule of the United States ("HTSUS"), on behalf of MAN Roland Inc. We have had an opportunity to review that ruling and now find it no longer reflects our view as to the classification of the recorded data. This ruling modifies NY E83923 to the extent noted.

*Facts:*

According to your letter, the AUROSYS is designed to provide efficient handling of paper rolls, as well as palletized newspaper inserts, printing plates and other materials for newspaper printing presses. It is composed of a number of semi-automatic or fully-automatic modules which are linked together in various configurations to provide a customized paper roll logistics system. In addition to the units shipped to the client, the AUROSYS will be imported with Windows NT software pre-loaded on a hard disk drive, as well as a back-up of the same software on CD-ROMs.

*Issue:*

What is the classification of software (recorded media) in the form of CD-ROMs or of recorded data when pre-loaded on the hard disk drive of the AUROSYS?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

Note 6 to Chapter 85, HTSUS, states that:

Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Recorded media of heading 8523 or 8524 must be classified separately if it is presented with the apparatus for which it is intended. The recorded media must also be classified separately if it is not presented with the apparatus for which it is intended.

Accordingly, the importation of CD-ROMs containing back-up data, or "software" falls within Legal Note 6 to Chapter 85, regardless of whether or not they are shipped with the AUROSYS. These CD-ROMs are properly classified under subheading 8524.39.4000, HTSUS, which provides for records, tapes and other recorded media for sound or other similarly recorded phenomena \* \* \*; disks for laser reading systems: other: for reproducing representations of instructions, data, sound and image, recorded in a machine readable binary form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine; proprietary format recorded disks.

We next examine the treatment of the software on the AUROSYS when recorded on the hard-disk drive.

Previously, Customs has interpreted Note 6 to Chapter 85, HTSUS, to include software that comes pre-loaded on the hard disk drive of an ADP and required that it be broken out and separately classified (see HQ 956962, dated September 13, 1994; HQ 960259, dated November 12, 1997; HQ 958808, dated May 15, 1996; HQ 957981, dated July 9, 1997; HQ 959651, dated July 9, 1997; NY A86557, dated August 30, 1996; NY E86558, dated September 14, 1999; NY E83923, dated July 26, 1999). Because there was no substantive reasoning or analysis as to this classification, Customs apparently assumed that the hard disk platters that are integrated into the hard disk drive that is installed in the central processing unit are the applicable "media" under the provision and that the hard disk drive itself is the "apparatus for which they are intended."

Customs has established that hard disk platters that are incorporated into a hard disk drive of an ADP are not separately classified because they become part of the drive itself, which is specifically provided for under heading 8471 (see HQ 083588, dated September 22, 1989; NY 807998, dated March 17, 1995). In HQ 954361, dated November 2, 1993, Customs classified hard disk drive assemblies under heading 8471.93, HTSUS, and did not separately classify the unrecorded media contained within the assemblies. Compare this treatment with HQ 953168, dated March 31, 1993, in which Customs classified separately presented hard disks, or platters, under heading 8523, HTSUS.

Because the inclusion of platters into a hard disk drive is a permanent process, they become incorporated and subsumed by the disk drive under a new classification, unlike floppy disks, diskettes, CD-ROMs and other media which are clearly removable, separate and distinct from the "apparatus for which they are intended." Thus, hard disk platters, whether recorded or unrecorded, that are incorporated into hard disk drives are not media of either heading 8523 or 8524, HTSUS, and thus fall outside of the scope of Note 6 to Chapter 85, HTSUS.

NY E83923 held that software that came pre-loaded on the hard disk drive of the AUROSYS fell within the scope of Note 6 to Chapter 85. For the foregoing reasons, it is now Customs view that such recorded data is outside of the scope of the Note and that the "software" is subsumed into the system and should be classified with the data processing machine.

Although it has no bearing on Customs new view on the classification of this type of recorded data, Customs notes that on January 1, 2002, the language of Note 6 to Chapter 85 will be changed to read as follows:

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This Note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

Also changed will be the Explanatory Note to Chapter 85, General, (B) Parts. The following addition will be made to Part "(B)" on page 1443:

(B) MEDIA PRESENTED WITH APPARATUS FOR WHICH THEY ARE INTENDED (Chapter Note 6)

Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented together with the apparatus for which they are intended (e.g., a video cassette presented with a video cassette player). This Note does not apply, however, when the media are presented together with articles other than the apparatus for which they are intended (e.g., materials for use in instructing children in mathematics consisting of an instructional video cassette, an instructional workbook and a small calculating machine). When the media are presented with articles other

than the apparatus for which they are intended, the following classification principles should be applied: (1) If the media and the other articles make up a set put up for retail sale under General Interpretative Rule 3 (b), the set should be classified by application of that Rule; or (2) If the media and the other articles do not make up a set put up for retail sale under General Interpretative Rule 3 (b), then they should be classified separately in their own appropriate headings.

The present Part "(B)" will be re-lettered as Part "(C)".

*Holding:*

For the reasons stated above, software imported in the form of separate CD-ROMs is classified under subheading 8524.39.4000, HTSUS, while data entered on hard disk drives incorporated into the AUROSYS will be classified with that system as determined by NY E83923.

*Effect on other Rulings:*

NY E83923 is modified to the extent described above, i.e., the language in NY E83923 no longer reflects our view of Legal Note 6 to Chapter 85, HTSUS.

JOHN DURANT,  
*Director,*  
*Commercial Rulings Division.*

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## PROPOSED MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO THE COUNTRY OF ORIGIN MARKING OF DISPOSABLE TUBE CONTAINERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of a country of origin marking ruling letter and treatment relating to the country of origin marking of disposable tube containers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the country of origin marking of disposable tube containers and to revoke any treatment previously accorded by Customs to substantially identical merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before November 30, 2001.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Special Classification and Marking Branch, (202) 927-0657.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the country of origin marking of imported tube containers imported empty to be filled in the U.S. Although in this notice Customs is specifically referring to one ruling, HQ 561829, dated December 15, 2000, (attachment A), this notice covers any rulings on this merchandise which may exist but have not specifically been identified that are based on the same rationale. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice which is contrary to the position set forth in the proposed ruling letter, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the law. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In Headquarters Ruling Letter ("HQ") 561829, dated December 15, 2000, (Attachment A), Customs ruled on whether foreign-made empty disposable plastic tube containers may be marked with a U.S. address and the phrase "Made in U.S.A." when the tubes will be filled in the U.S. with a U.S.-origin product. Customs held that the foreign-made tubes could not be marked with the phrase "Made in U.S.A." at the time of importation pursuant to 19 U.S.C. 1304. This ruling is in conflict with a line of Customs rulings. For instance, in HQ 734240, dated December 24, 1991, Customs held that the phrase "Made in U.S.A." on foreign-made tubes and aerosol cans imported empty to be filled in the U.S. with U.S.-origin products would not mislead an ultimate purchaser as to the origin of the disposable container, as long as the outer container of the disposable foreign-made containers was properly marked. *See also* HQ 734781, dated December 24, 1992; and HQ 734573, dated August 10, 1992.

Based on the line of cases cited above, we find that pursuant to 19 U.S.C. 1304, the foreign-origin disposable tubes imported empty may be imported bearing the phrase "Made in U.S.A.," assuming that the disposable tubes will be filled by the ultimate purchaser of the tubes with U.S.-origin products and the outer container of the imported disposable tubes is marked with the country of origin of the tubes.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify HQ 561829, and any other rulings not specifically identified, to reflect the proper interpretation of 19 U.S.C. 1304 pursuant to the analysis set forth in proposed HQ 562109 (see Attachment B to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

MYLES HARMON,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

## [ATTACHMENT A]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

Washington, DC, December 15, 2000.

MAR-2 RR:CR:SM 561829 KSG

Category: Marking

ERNESTO BUSTAMANTE  
OPERATIONS MANAGER  
WILLIAM F. JOFFREY, INC.  
P.O. Box 698  
Nogales, AZ 85628-0698

Re: Country of origin marking of imported tubes to be filled with cosmetics; 134.22(d)(2); usual container; NAFTA.

DEAR MR. BUSTAMANTE:

This is in response to your letter of July 17, 2000, on behalf of Thatcher Tubes, requesting a binding ruling concerning the country of origin marking requirements for imported tube containers. You submitted a sample for our examination.

*Facts:*

Thatcher Tubes plans to import empty disposable plastic tube containers and caps that are made in Mexico. Once imported into the U.S. through the port of Nogales, Arizona, the plastic tubes will be shipped to customers who will fill and seal the tubes to form the finished article. The tubes will be filled with various products of U.S. origin, including hand cream. The filled and sealed tubes will be sold to ultimate purchasers in the U.S.

The imported empty tubes will be marked with the name and address of the U.S. manufacturer of the various products (for example, hand cream) to be inserted into the tubes as well as instructions on use of the product. The sample submitted is an empty tube for Neutrogena hand cream. On the back of the tube, there is a U.S. address of Neutrogena Corporation and the phrase "Made in U.S.A."

*Issue:*

What are the country of origin marking requirements for imported tube containers, as described above?

*Law and Analysis:*

Section 304 of the Tariff Act of 1930, as amended, (19 U.S.C. 1304) provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements of 19 U.S.C. 1304.

Section 134.22(d)(1), Customs Regulations (19 CFR 134.22(d)(1)), defines "usual container" as a container in which a good will ordinarily reach its ultimate purchaser. With regard to a good of a NAFTA country which is a usual container, section 134.22(d)(2) provides that:

A good of a NAFTA country which is a usual container, whether or not disposable and whether or not imported empty or filled, is not required to be marked with its own country of origin. If imported empty, the importer must be able to provide satisfactory evidence to Customs at the time of importation that it will be used only as a usual container (that it is to be filled with goods after importation and that such container is of a type in which these goods ordinarily reach the ultimate purchaser).

In a similar case, Customs held in Headquarters Ruling Letter ("HRL") 559073, dated June 28, 1995, that empty cosmetic containers imported into the U.S. to be filled with U.S.-made cosmetics were excepted from being marked with their country of origin pursuant to 19 CFR 134.22(d)(2). However, the outermost containers in which the cosmetic containers are imported and reach the ultimate purchaser in the U.S. are required to be marked with the country of origin of the cosmetic containers. Also see HRL 560705, dated January 28, 1998.

Based on the above, we find that pursuant to 19 CFR 134.22(d), the imported tubes and caps in this case are "usual containers" and are excepted from individual marking pur-

suant to 19 CFR 134.22(d)(2). The outermost containers in which the tubes and caps are imported and reach the ultimate purchaser in the U.S. are required to be marked with the origin of the tubes and caps.

The term "ultimate purchaser" for a good of a NAFTA country is defined in 19 CFR 134.1(d) as "the last person in the U.S. who purchases the good in the form in which it was imported." In this case, the customers in the U.S. who fill the plastic tubes with their products would be considered the ultimate purchasers of the tubes. See 19 CFR 134.24(c)(1).

Section 134.46, Customs Regulations (19 CFR 134.46), as amended, provides:

In any case in which the words "United States," or "American," the letters "U.S.A.," any variation of such words or letters, or the name of any city or location in the United States, or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced appear on an imported article or its container, and those words, letters or names may mislead or deceive the ultimate purchaser as the actual country of origin of the article, there shall appear legibly and permanently in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning.

The U.S. address on the sample tube submitted is the address of the ultimate purchaser and therefore, it would not trigger the special marking requirements of 19 CFR 134.46 since the ultimate purchaser would not be confused or misled by its own address. However, it would be unacceptable under 19 U.S.C. 1304 for the imported empty tube containers to be marked "Made in U.S.A." as they are of foreign origin. Whether the tubes may be marked "Made in U.S.A." after they are filled in the U.S. is within the jurisdiction of the Federal Trade Commission.

*Holding:*

Pursuant to 19 CFR 134.22, the imported empty tubes and caps are usual containers and are excepted from being marked with their own country of origin. The outermost containers in which the unfinished tubes and caps are imported are required to be marked with the origin of the tubes and caps (Mexico).

At the time of importation, the empty foreign-origin tubes may not be marked "Made in U.S.A."

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN DURANT,

*Director,*

*Commercial Rulings Division.*

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

Washington, DC.

MAR-2 RR:CR-SM 562109 KSG

Category: Marking

ERNESTO BUSTAMANTE  
OPERATIONS MANAGER  
WILLIAM F. JOFFREY, INC.  
P.O. Box 698  
Nogales, AZ 85628-0698

Re: Country of origin marking of imported tubes to be filled with cosmetics; modification of HQ 561829; "Made in U.S.A." marking on disposable containers.

DEAR MR. BUSTAMANTE:

This is in reference to Headquarters Ruling Letter ("HQ") 561829, that was issued to you on December 15, 2000, on behalf of Thatcher Tubes which dealt with the country of

origin marking requirements for foreign-made tubes imported empty to be filled in the U.S. We have reviewed this ruling in light of our previous rulings and have determined that the portion of HQ 561829 relating to the "Made in USA" marking on the empty tube containers is incorrect. Therefore, this ruling modifies HQ 561829 and sets forth the proper country of origin marking requirements for the foreign-origin tubes.

*Facts:*

Thatcher Tubes plans to import empty disposable plastic tube containers and caps that are made in Mexico. Once imported into the U.S. through the port of Nogales, Arizona, the plastic tubes will be shipped to customers who will fill and seal the tubes to form the finished article. The tubes will be filled with various products of U.S. origin, including hand cream. The filled and sealed tubes will be sold to ultimate purchasers in the U.S.

The imported empty tubes will be marked with the name and address of the U.S. manufacturer of the various products (for example, hand cream) to be inserted into the tubes as well as instructions on use of the product. The sample submitted is an empty tube for Neutrogena hand cream. On the back of the tube, there is a U.S. address of Neutrogena Corporation and the phrase "Made in U.S.A."

*Issue:*

Whether the foreign-origin disposable tubes may be imported bearing the phrase "Made in U.S.A."

*Law and Analysis:*

Section 304 of the Tariff Act of 1930 (19 U.S.C. 1304), as amended, provides that unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements of 19 U.S.C. 1304.

In Headquarters Ruling Letter (HQ) 734240, dated December 24, 1991, Customs held that the phrase "Made in U.S.A." on foreign-made tubes and aerosol cans imported empty to be filled in the U.S. with U.S.-origin products would not mislead an ultimate purchaser as to the origin of the disposable container, as long as the outer container of the disposable foreign-made container was properly marked. Therefore, the disposable containers were excepted from individual marking and the phrase "Made in U.S.A." could appear on the disposable containers at the time of importation. *See also* HQ 734781, dated December 24, 1992; and HQ 734573, dated August 10, 1992.

In this instance there is no implication that the tube is of U.S. origin; the reference plainly is to its future U.S. contents. The marking "Made in U.S.A." would not mislead an ultimate purchaser of the disposable containers, who have ample knowledge of the country of origin of the disposable tubes and know that the phrase "Made in U.S.A." is on the disposable tubes to refer to the origin of the future contents of the tubes. Provided that the outer container of the disposable tube is marked as to the origin of the disposable tubes, the country of origin marking requirements of 19 U.S.C. 1304 will be satisfied. Consistent with this ruling, we propose to modify HQ 561829.

*Holding:*

The empty foreign-origin disposable tubes may be imported marked "Made in U.S.A.," assuming that the tubes will be filled by the ultimate purchaser of the tubes in the U.S. with U.S.-origin products and the outer container of the imported disposable tubes is marked with the country of origin of the tubes.

Consistent with this ruling, we propose to modify HQ 561829, dated December 15, 2000.

JOHN DURANT,

*Director,*

*Commercial Rulings Division.*

## PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF LINEAR GUIDE SLIDERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to tariff classification of linear guide sliders.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of linear guide sliders, and to revoke any treatment Customs has previously accorded to substantially identical transactions. These articles consist of circulating ball bearings in a casing which is affixed to a metal arm. The balls circulate in pathways within the casing which allows the casing to travel up and down the length of the arm with minimal friction. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before November 30, 2001.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example,

under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of linear guide sliders. Although in this notice Customs is specifically referring to one ruling, NY B88876, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In NY B88876, dated August 22, 1997, certain linear guide sliders were held to be classifiable in subheading 8473.30.50, HTSUS, as other parts and accessories of [automatic data processing machines and units thereof] of heading 8471. This ruling was based on the belief that the linear guide sliders qualified as parts of ADP machines or units thereof because they were used with tape storage peripheral devices. NY B88876 is set forth as "Attachment A" to this document.

It is now Customs position that these linear guide sliders are classifiable in subheading 8482.10.50, HTSUS, as other ball bearings. Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY B88876 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis in HQ 964815, which is set forth as "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment it previously accorded to substantially identical transactions. Before

taking this action, we will give consideration to any written comments timely received.

Dated: October 15, 2001.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
New York, NY, August 22, 1997.  
CLA-2-84:RR:NC:1:110 B88876  
Category: Classification  
Tariff No. 8473.30.5000

MS. ANDREA YBARRA  
STORAGE TECHNOLOGY CORPORATION  
2270 South 88th Street  
Louisville, CO 80028-0001

Re: The tariff classification of linear guide sliders from Japan.

DEAR MS. YBARRA:

In your letter dated August 18, 1997, you requested a tariff classification ruling.

The merchandise under consideration involves linear guide sliders which are used in tape storage peripheral devices. The sliders are assembled onto a threader arm and function as a threader. These sliders thread the tape through the tape path from the cartridge to the take up reel.

These linear guide sliders are parts which are used with units of automatic data processing machines (ADP) as defined in Legal Note 5 (B) of Chapter 84 of the HTS. The linear guide sliders are principally used with tape storage peripheral devices and would be classified as per Legal Note 2(b) of Section XVI of the HTS. Please note HQ Ruling 955270 of August 1994, which involved similar merchandise.

The applicable subheading for the linear guide sliders will be 8473.30.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for other parts and accessories of the machines of heading 8471. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Art Brodbeck at 212-466-5490.

ROBERT B. SWIERUPSKI,  
Chief, Metals & Machinery Branch,  
National Commodity Specialist Division.

## [ATTACHMENT B]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR:CR:GC 964815 JAS  
Category: Classification  
Tariff No. 8482.10.50

ANDREA YBARRA  
STORAGETEK  
2270 South 88<sup>th</sup> Street  
Louisville, CO 80028-0001

Re: NY B88876 Revoked; Linear Guide Sliders.

DEAR MS. YBARRA:

In NY B88876, which the Director of Customs National Commodity Specialist Division, New York, issued to you on August 22, 1997, certain linear guide sliders were found to be classifiable in subheading 8473.30.50, Harmonized Tariff Schedule of the United States (HTSUS), as other parts and accessories of the machines of heading 8471. We have reconsidered this classification and now believe that it is incorrect.

**Facts:**

The merchandise in NY B88876, identified as part 10110314, is known variously as a linear guide, slider, and linear guide slider. It consists of two rows of circulating ball bearings in a square metal casing affixed to a 1½-inch long metal arm. The arm has round holes punched at 1-inch intervals along its length. The balls circulate in pathways within the casing which allows the casing to travel in grooves up and down the length of the arm with minimal friction. After importation, these linear guide sliders are assembled onto a threader arm, an article that functions as a threader in tape storage peripheral devices which are units of automatic data processing (ADP) machines. These devices thread tape through the tape path from the cartridge to the take-up reel.

The HTSUS provisions under consideration are as follows:

<b>8473</b>	Parts and accessories * * * suitable for use solely or principally with machines of headings 8469 to 8472:
<b>8473.30</b>	Parts and accessories of the machines of heading 8471: Not incorporating a cathode ray tube:
<b>8473.30.50</b>	Other
<b>8482</b>	Ball or roller bearings, and parts thereof:
<b>8482.10</b>	Ball bearings:
<b>8482.10.50</b>	Other

**Issues:**

Whether linear guide sliders are goods included in heading 8482.

**Law and Analysis:**

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Subject to certain exceptions that are not relevant here, goods that are identifiable as parts of machines or apparatus of Chapter 84 or Chapter 85 are classifiable in accordance with Section XVI, Note 2, HTSUS. See *Nidec Corporation v. United States*, 861 F. Supp. 136, *aff'd*, 68 F.3d 1333 (1995). Parts which are goods included in any of the headings of Chapters 84 and 85 are in all cases to be classified in their respective headings. See Note

2(a). Other parts, if suitable for use solely or principally with a particular machine, or with a number of machines of the same heading, are to be classified with the machines of that kind. See Note 2(b).

The linear guide sliders in NY B88876 were described as parts used with units of automatic data processing machines which qualified them for classification in subheading 8473.30.50 in accordance with Section XVI, Note 2(b), HTSUS. The ruling cited in NY B88876 on supposedly similar merchandise, HQ 955270, dated August 5, 1994, concerned magnetic head sliders. These were articles principally used with automatic data processing machines to read and write from a magnetic disk. These articles consisted both of a mixture of ceramic materials and active sensors or transducer elements deposited onto one end of the slider body using semiconductor manufacturing techniques, and ceramic slider bodies into which a magnetic core is bonded with epoxy and glass. The linear guide sliders at issue bear no resemblance, either by function or design, to the magnetic head sliders in HQ 955270.

The ENs on p. 1433 include within heading 8482:

(A) **Ball bearings**, with single or double rows of balls. This group also includes **slide mechanisms with bearing balls**, for example:

\* \* \* \* \*

(3) The free-travelling type, of steel, comprising a segment, a casing enclosing the bearing balls, and a guide rail with a groove of triangular section. (Emphasis original).

The linear guide sliders at issue consist of a casing enclosing bearing balls and an arm on which it travels, which is the equivalent of a guide rail. These articles are within the cited EN description. Notwithstanding the use of these articles with tape storage peripheral devices which are units of ADP machines, linear guide sliders are goods included in heading 8482 in accordance with Section XVI, Note 2(a). This conclusion is consistent with HQ 086397, dated June 20, 1990, in which linear motion guides were found to be classifiable in subheading 8482.10.50, HTSUS. The articles consisted of a casing enclosing ball bearings and grooved rails. After importation, machine tool tabletops were affixed to the tops of the bearing casings and the assemblies installed in machine tools.

*Holding:*

Under the authority of GRI 1, linear guide sliders represented by part 10110314 are provided for in heading 8482. They are classifiable in subheading 8482.10.50, HTSUS. NY B88876, dated August 22, 1997, is revoked.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

## PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF "Z" CHIPS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a ruling letter and treatment relating to tariff classification of "Z" chips.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of "Z" chips under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before November 30, 2001.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, General Classification Branch, (202) 927-2388.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise,

and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of "Z" chips. Although in this notice Customs is specifically referring to one ruling, NY D87688, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY D87688 dated February 25, 1999, set forth as Attachment A to this document, Customs classified "Z" chips, ceramic substrates that contain capacitors and resistors, in subheading 8543.89.96, HTSUS, as: "Electrical machines or apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: \* \* \* Other machines and apparatus: \* \* \* Other: \* \* \* Other: \* \* \* Other: \* \* \* Other."

It is now Customs position that the "Z" chips in this ruling are properly classifiable under subheading 8534.00.00, HTSUS, as: "Printed circuits." Proposed HQ 965098, revoking NY D87688, is set forth as Attachment B to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY D87688 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 965098. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions.

Before taking this action, we will give consideration to any written comments timely received.

Dated: October 12, 2001.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
New York, NY, February 25, 1999.  
CLA-2-85:RR:NC:1:112 D87688  
Category: Classification  
Tariff No. 8543.89.9695

MS. SHARON M. BURNS  
AVX KYOCERA  
2875 Highway 501  
Conway, SC 29526

Re: The tariff classification of a "Z chip" from England.

DEAR MS. BURNS:

In your letter dated January 29, 1999 you requested a tariff classification ruling.

As indicated by the submitted descriptive literature, the "Z chip" is a capacitor/resistor device which has both the capacitor and the resistor elements co-fired into the same package. It is designed to function as an impedance matching device.

The applicable subheading for the "Z chip" will be 8543.89.9695, Harmonized Tariff Schedule of the United States (HTS), which provides for other electrical machines and apparatus, \* \* \*, not specified or included elsewhere in Chapter 85, HTS. The rate of duty will be 2.6 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist David Curran at 212-637-7049.

ROBERT B. SWIERUPSKI,  
Director,  
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC.

CLA-2 RR:CR:GC 965098 GOB

Category: Classification

Tariff No. 8534.00.00

Ms. SHARON M. BURNS  
CUSTOMS SPECIALIST  
AVX KYOCERA  
2875 Highway 501  
Conway, SC 29526

Re: Revocation of NY D87688; "Z" chip.

DEAR Ms. BURNS:

This is in response to your letter of May 22, 2001, in which you request reconsideration of NY D87688, issued to you on February 25, 1999, by the Director, Customs National Commodity Specialist Division, New York, regarding the classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of a ceramic substrate that contains capacitors and resistors.

*Facts:*

In D87688, the "Z" chip was described as follows: " \* \* \* a capacitor/resistor device which has both the capacitor and resistor devices co-fired into the same package. It is designed to function as an impedance matching device."

In your letter of May 22, 2001, you state in pertinent part as follows:

This component is a capacitor and resistor on a ceramic base, as both components are passive, we believe that the correct classification should be 8534.0000 \* \* \*. The capacitor/resistor is manufactured using a printing process similar to the process used for multilayer ceramic capacitors. The Z chip is a fully integrated RC made with a stack of multiple, closely spaced resistor elements arranged in a multilayer capacitor structure.

Your Internet site provides the following general description of the "Z" chip:

To meet the needs of today's high speed circuits and reduced power requirements, AVX has developed the "Z" Chip. This impedance matching component, available in a standard 0603 package, breaks the barrier of component density by providing a truly integrated series resistor-capacitor design.

The "Z" Chip enables a board designer to achieve maximum signal integrity by eliminating reflections and reducing DC power consumption.

Another Internet site describes the "Z" chip as follows:

\* \* \* a discrete impedance matching series resistor-capacitor (RC) chip. This device contains the resistor within the chip, and it is one of the few RC chips in an 0603 size. Designed to meet the needs of today's high-speed, high-power efficient circuits, the chip is suited for line termination applications in products such as laptops and handheld devices.

The same Internet site quotes a product manager who states as follows:

While the resistor alone is still the prevalent method for matching impedance, the biggest problem with this method is that when the signal line is high, you are drawing continuous DC current. With the "Z" Chip, you get the impedance matching properties of a resistor, but you also get the high DC resistance of the capacitor. The advantage is reduced power consumption and board space savings provided by a volumetrically efficient component.

In NY D87688 Customs determined the "Z" chip to be classified in subheading 8543.89.96, HTSUS, as: "Electrical machines or apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: \* \* \* Other machines and apparatus: \* \* \* Other: \* \* \* Other: \* \* \* Other: \* \* \* Other."

*Issue:*

What is the classification under the HTSUS of the "Z" chip?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN's") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN's provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

The HTSUS provisions under consideration are as follows:

8534.00.00	Printed circuits	*	*	*	*	*	*	*
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:							
	Other machines and apparatus:							
8543.89	Other:							
	Other:							
	Other:							
8543.89.96	Other.							

Note 4 to Chapter 85, HTSUS, provides in pertinent part as follows:

For the purposes of heading 8534 "*printed circuits*" are circuits obtained by forming on an insulating base, by any printing process (for example, embossing, plating-up, etching) or by the "film circuit" technique, conductor elements, contacts or other printed components (for example, inductances, resistors, capacitors) alone or interconnected according to a pre-established pattern, other than elements which can produce, rectify, modulate or amplify an electrical signal (for example, semiconductor elements).

The term "*printed circuits*" does not cover circuits combined with elements other than those obtained during the printing process, nor does it cover individual, discrete resistors, capacitors or inductances. Printed circuits may, however, be fitted with non-printed connecting elements. [All emphasis in original.]

Information submitted by you (an abstract entitled *Multilayer Cofired RC's for Line Termination* by Ritter, Templeton, and Smith of the AVX Advanced Product and Technology Center) describes the "Z" chip in pertinent part as follows:

Cofirable material systems are comprised of dielectrics, resistors and conductors that are optimized to densify at similar firing temperatures with nearly matched shrinkage. These material systems allow the design of multilayer devices wherein the capacitor and resistor elements are fully integrated in the structure of the device. Unlike ceramic chip-carrier packages with single layer buried resistors interconnected with buried metallic conductors—currently the most common usage of these cofirable material systems—the fully integrated RC is made with a stack of multiple, closely spaced resistor elements arranged in a multilayer capacitor structure. [Diagram omitted.]

The device resistance comes from the parallel resistance of the individual layers, and the device capacitance arises from capacitance coupling of the planar resistor elements that are terminated in the multilayer capacitor structure. In this structure, the resistor layers themselves form the electrodes of a parallel plate capacitor. We have coined the term Z Chip™ for this device to denote its application for impedance matching. Although the construction of this cofired RC is simple, the device is electrically complex because the capacitance and resistance are physically distributed throughout the entire device.

After a careful consideration of this issue, we find that the "Z" chip meets the definition of printed circuit in Note 4 to Chapter 85, HTSUS. The capacitors and resistors are passive components that were formed on an insulating base by a printing process. Accordingly, the "Z" chips are classified in subheading 8534.00.00, HTSUS, as: "Printed circuits."

This determination is consistent with our determination in HQ 089376 dated September 11, 1991, where we classified a resistor network in subheading 8534.00.00, HTSUS.

The resistor network was described as: " \* \* \* a ceramic circuit substrate with printed conductors and resistors that forms a network which was applied by a printing process."

*Holding:*

The "Z" chips are classified in subheading 8534.00.00, HTSUS, as: "Printed circuits." NY D87688 is revoked.

JOHN DURANT,  
*Director,*  
*Commercial Rulings Division.*

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PROPOSED MODIFICATION OF RULING LETTER AND  
REVOCATION OF TREATMENT RELATING TO THE  
CLASSIFICATION OF WOMAN'S UPPER BODY GARMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of a ruling letter and revocation of treatment relating to the classification of a woman's upper body garment.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter relating to the tariff classification of a woman's upper body garment under the Harmonized Tariff Schedule of the United States (HTSUS), and to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before November 30, 2001.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address during regular business hours.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textile Branch, (202) 927-2380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub.L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended

and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. section 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a woman's upper body garment. Although in this notice, Customs is specifically referring to one ruling, New York Ruling (NY) G80103 dated August 28, 2000, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of the final notice.

In NY G80103, Customs ruled that a woman's upper body garment identified as Style 0045 was classifiable in subheading 6212.10.9020, HTSUSA, in the provision for "Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not

knitted or crocheted: Brassieres: Other: Other, Of man-made fibers". This ruling letter is set forth as "Attachment A" to this document. Since the issuance of this ruling, Customs has reviewed the classification of this item and has determined that the cited ruling is in error. We have determined that this item is properly classifiable as a "corset" of man-made fibers under subheading 6212.30.0020, HTSUSA. The merchandise identified as Style 0045 is correctly classified in subheading 6212.30.0020, HTSUSA, which provides for, "Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Corsets, Of man-made fibers.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify NY G80103 dated August 28, 2000, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter HQ 964537 (see "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: October 15, 2001.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
*New York, NY, August 28, 2000.*

Document No. CLA-2-61:RR:NC:TA:354 G80103  
Category: Classification  
Tariff No. 6114.30.1020 and 6212.10.9020

MR. GARTH PAULEY  
LANE BRYANT, INC.  
*Five Limited Parkway  
Reynoldsburg, OH 43068*

Re: The tariff classification of ladies' apparel from Thailand and China.

DEAR MR. PAULEY:

In your letter dated July 21, 2000, you requested a classification ruling. The provided samples will be returned as per your request.

Style 5407 is a ladies' top constructed of a 79% nylon 21% spandex knitted fabric. The top features a modified square neckline and a back which is cut straight across from side seam to side seam, shoulder straps which are adjustable at the rear of the garment, built in shelf support, and a hook and eye rear closure. The garment does not reach the waist.

Style 0042 is a ladies' underwire long line brassiere constructed of a 79% nylon 21% spandex knitted fabric which measures approximately 10 1/4 inches from top to bottom at

the sides, to 13 inches at the center front, and 8 inches at the back. The garment features two-ply seamed cups, adjustable partially elasticized 5/8" shoulder straps, 6 vertical stays, 11 triple hook and eye rear closures, an elasticized fabric band at the bottom of the garment which helps to keep the garment in place on the wearer and lace trim at the bottom of and between the underwire cups.

Style 0045 is a ladies' long line brassiere with underwire cups, two front center and two rear center panels constructed of a 91% nylon 9% spandex knitted fabric. Two front and two rear side panels are constructed of a 60% nylon 40% spandex fishnet fabric. The garment measures approximately 11 1/4 inches from top to bottom at the sides, to 14 inches at center front, and 8 1/2 inches at the back. The garment features adjustable partially elasticized 5/8" shoulder straps, 6 vertical stays, 12 single hook and eye rear closures, a row of 20 double hooks with a lace-up ribbon to connect and adjust the garment front panels and an elasticized fabric band at the bottom of the garment which helps to keep the garment in place on the wearer.

The applicable subheading for style 5407 will be 6114.30.1020, Harmonized Tariff Schedule of the United States (HTS), which provides for Other garments, knitted or crocheted: of man-made fibers: tops \* \* \* women's or girls'. The duty rate will be 28.9 percent *ad valorem*. The applicable subheading for style 0042 & 0045 will be 6212.10.9020, HTS, which provides for brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not crocheted: brassieres; other; other of man-made fibers. The duty rate will be 17.3 percent *ad valorem*.

Style 5407 falls within textile category designation 639, styles 0042 & 0045 fall within textile category designation 649. Based upon international textile trade agreements products of Thailand and China are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the U.S. Customs Service Textile Status Report, an internal issuance of the U.S. Customs Service, which is available at the Customs Web site at [www.Customs.gov](http://www.Customs.gov). In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Brian Burtnik at 212-637-7083.

ROBERT B. SWIERUPSKI,

Director,

National Commodity Specialist Division.

## [ATTACHMENT B]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.  
CLA-2 RR:CR:TE  
Category: Classification  
Tariff No. 6114.30.1020 and 6212.30.0020

MR. GARTH PAULEY  
SPECIALIST, INTIMATE APPAREL  
LIMITED DISTRIBUTION SERVICES  
*Seven Limited Parkway*  
*Reynoldsburg, OH 43068*

Re: Request for reconsideration of classification and Modification of NY G80103 Two woman's upper body garments.

DEAR MR. PAULEY:

This is in response to a letter, dated September 14, 2000, on behalf of the Lane Bryant company, requesting reconsideration of Customs New York Ruling (NY) G80103 which classified woman's undergarments under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Samples were submitted to this office for examination and will be returned under separate cover per your request.

We have reviewed this ruling and determined that the classification provided for merchandise identified as Style 0045 is incorrect. This ruling modifies NY G80103 by providing the correct classification for Style 0045.

*Facts:*

Style 5407 is a woman's upper body garment constructed of 79 percent nylon and 21 percent spandex paisley printed knit fabric. The front of the garment is comprised of 5 panels. The back is constructed of two panels with a back closure. The garment features shoulder straps with a rear slide adjustment. The front portion of the shoulder strap has been finished in ¾ inch wide matching paisley knit fabric. The back portion of each shoulder strap features ¾ inch wide elastic in matching solid color. The built-in brassiere is comprised of lightly padded cups of knit fabric and foam construction with each having a single center seam for shaping. The cups have been sewn into an elastic net (knit construction) fabric that forms the interior built-in shelf support of the garment. The lower portion of this built-in shelf is constructed with a 1¼ inch wide black elastic with scalloped edging and the tradename "realwear" embroidered in black and repeating at 3 inch intervals. A single piece of blue elastic (¾ inch wide) has been sewn to the inside of the paisley knit fabric strap. This soft blue elastic strip is sewn to the top inside edge of the garment in one continuous strip descending from the strap to under the arm and ending at the back seam closure. Strips of hook and eye closures run vertically along each back panel (8½ inches long). When fastened the hook and eye closures form a secure, nongapping back seam composed of black knit edging strips sewn to the outside of the garment (1¼ inch wide by 8½ inches long). The bottom edge of the garment is slightly shaped so that the front center panel forms the longest panel. The same soft blue elastic used on the inside of the top edge has been secured to the inside of the entire bottom edge of the garment.

Style 0045 combines a woman's underwire brassiere with long shaped panels that descend to the waist. The garment consists of a total of eight panels which cover the torso. The front center panels are longer than the other panels resulting in a slightly shaped hemline at the lower edge of the garment. Six of the connecting seams on these panels contain a strip of boning. The front panels feature metal eyes running in vertical strips along the edge. A satin ribbon is laced through the metal eyes, in alternating fashion, to join the two front panels at the center of the garment. The front of the shoulder straps are comprised of two narrow strips of knit fabric joined to a matching ¾ inch wide elastic with rear slide adjustment. The brassiere cups are constructed of 91 percent nylon and 9 percent spandex knit satin-like fabric with seams running horizontally for shaping. The cups are lined with a knit fabric and also feature a horizontal seam. The two front center panels and two back panels are unlined and constructed of the same satin-like knit fabric used in the brassiere cups. The remaining four panels are constructed of a 60 percent nylon 40 percent spandex fishnet knit fabric and are lined with a knit fabric. Each back panel has been edged with hook and eye closures that run vertically (8 ½ inches long) to completely close

the garment. A soft narrow elastic (1/2 inch wide) with scalloped edge has been sewn along the top edge of the four back panels and at the bottom edge of all eight panels.

In New York Ruling (NY) G80103, dated August 28, 2000, Style 5407 was classified in subheading 6114.30.1020, HTSUSA, which provides for "Other garments, knitted or crocheted: Of man-made fibers: Tops, Women's or girls". Style 0045 was classified in subheading 6212.10.9020, HTSUSA, in the provision for "Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Brassieres: Other: Other, Of man-made fibers".

You disagree with Customs classification of both styles. As such, you have asserted that Style 5407 has all the features normally associated with a support garment and brassiere and should be correctly classified under subheading 6212.10.5020, HTSUSA, in the provision for "Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Brassieres: Containing lace, net or embroidery: Other, Of man-made fibers." You further assert that Style 0045 has the essential characteristics of a corset and should be classified in subheading 6212.30.0020, HTSUSA, which is the provision for "Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Corsets, Of man-made fibers."

#### *Issue:*

What is the proper classification for the merchandise?

#### *Law and Analysis:*

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

#### *Style 5407*

With respect to the article identified as Style 5407, and classified by Customs under subheading 6114.30.1020, HTSUSA, we note that this is a residual provision for knit garments which are not included more specifically in the preceding headings of Chapter 61. Thus, we must first consider whether or not there are any other relevant provisions in Chapter 61 that may be applicable to Style 5407.

Heading 6109, HTSUSA, provides for "T-shirts, singlets, tank tops and similar garments, knitted or crocheted." The ENs to heading 6109 define "T-shirts" as lightweight knitted or crocheted garments of the vest type with long or short sleeves. The EN further states that the heading to 6109 also includes singlets and other vests which are classified in the heading without distinction between male and female wear.

The subject article is sleeveless, having narrow adjustable shoulder straps. Thus, it does not meet the definition of a "T-Shirt". However, it is well established that certain underwear styled camisoles are classifiable as "singlets" under heading 6109, HTSUSA. Furthermore, it was noted in HQ 089280, dated May 13, 1991, that for classification within Ch. 61, undergarments are divided into two categories; those which are worn below the waist are provided for within the provisions of heading 6108, HTSUSA, and those which are worn above the waist, except for full slips, are indicated in the terms of the headings of 6109, HTSUSA. Thus, the article now at issue must be similar to a camisole, singlet, tank top or undershirt to be within the scope of heading 6109, HTSUSA.

In Headquarters Ruling (HQ) 086977, dated June 19, 1990, a silk knit camisole designed to be worn under a shirt and over a bra, was classified under subheading 6109.90.2020, HTSUSA. In defining a "singlet" as an undershirt, it was determined that a camisole is similar to an undershirt and therefore properly classified in heading 6109, HTSUSA. The following rulings also classified various women's camisoles within heading 6109: HQ 089083, dated July 2, 1991; HQ 951246, dated June 24, 1992; HQ 951247, dated June 24, 1992; HQ 951809, dated September 8, 1992; HQ 952324, dated November 25, 1992; and

HQ 959031, dated July 23, 1996. It is important to note, however, that none of the camisoles in the aforementioned rulings had a sewn-in brassiere and a back closure. Because the article has a sewn-in shelf style bra with hook and eye closures at the back, we do not believe it is similar to the "singlets" (camisoles) classifiable within heading 6109, HTSUSA.

The *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, C.I.E. 13/88, November 23, 1988 (Textile Guidelines) sets forth features which would preclude a garment from consideration as a "tank top" under heading 6109, HTSUSA:

- 1) pockets, real or simulated, other than breast pockets;
- 2) any belt treatment including simple loops;
- 3) any type of front or back neck opening (zipper, button, or otherwise).

Although the Textile Guidelines specifically preclude any type of front or back "neck" opening, we presume this would also preclude those garments having openings that extend the entire length of the front or back. Such a neckline usually results in the absence of material at the neck because the front and/or back of a "tank top" may have a round, V, U, boat, square or other type of neckline that drops below the nape of the neck. Since the subject garment, Style 5407, has a full back opening with hook and eye closure, it is our determination that the full length hook and eye back closure would prevent this article from classification as a "tank top" under heading 6109, HTSUSA.

In determining whether or not the subject garment (Style 5407) is a brassiere classifiable under subheading 6212.10.5020, HTSUSA, we note that the top is designed with a built-in bra to provide support and is constructed of a knit fabric that provides total coverage to the wearer. However, a garment of this construction would be extremely cumbersome as a brassiere. The top itself is designed with five seamed panels that descend from top to bottom and completely cover the torso with a substantial opaque knit fabric. Although the seams connecting these panels create a snug fit, such detailing may prove bulky under a close-fitting top. Furthermore, this top has been constructed with two layers of fabric, i.e., a shelf bra and the exterior portion of the top.

Therefore, it is Customs determination that this garment, Style 5407, is not a brassiere. This decision is supported by HQ 950364, dated January 17, 1992, in which a sleeveless pullover with 1 inch shoulder straps, made of fine knit cotton, U-shaped neckline with a burnt-out lace insert, and extending below the waist, was classified as a "nonunderwear" tank top under subheading 6109.10.0060, HTSUSA. In reaching this decision, Customs applied the Textile Guidelines which specifically state that "the term 'underwear' refers to garments which are ordinarily worn under other garments and are not exposed to view when the wearer is conventionally dressed for appearance in public indoors or outdoors."

It is important to note that the garment identified as Style 5407, is designed and intended to be marketed with coordinating lounging pants, camisoles and oversize shirts that are described by the importer as "sleepwear" garments. These garments are constructed of the same fabric/colors as the subject top. In addition, bras and panties are marketed in fabrics and colors that match Style 5407.

We have assessed the subject top in conjunction with the coordinating pants, camisole and oversize shirt, and have determined that it would be better suited as loungewear (outerwear) than sleepwear. In *Mast Industries v. United States*, 9 CIT 549, 552 (1985), aff'd, 786 F.2d 1144 (1986), the court noted the definition of "nightwear" as "garments to be worn to bed." In the subject case, Style 5407 has a hook and eye closure along the back and sewn-in shelf bra that would render this garment uncomfortable as sleepwear. If the subject top is paired with the coordinating lounging pants and/or long oversize shirt, it could be used as loungewear. However, it is our understanding that the top is imported separately from the coordinating pants/oversize shirt. Therefore, it would not be classifiable under heading 6104, HTSUSA, as a loungewear "ensemble" because it is not entered with a garment designed to cover the lower part of the body (see EN 6104).

The next relevant provision is heading 6106, HTSUSA, which provides for women's blouses, shirts and shirt-blouses, knitted or crocheted. Once again, the Textile Guidelines provide that where a women's garment has excessively revealing arm or neck openings, it will be excluded from consideration as a shirt or blouse and considered a top. Thus, it is Customs determination that the garment identified as Style 5407 is a knit top which is not included more specifically in the preceding headings of Chapter 61 and is properly classifi-

able as an "Other" knitted garment of man-made fibers under subheading 6114.30.1020, HTSUSA.

In view of the foregoing, we affirm NY G80103, dated August 28, 2000, which classified Style 5407 in subheading 6114.30.1020, HTSUSA, as "Other garments, knitted or crocheted: Of man-made fibers: Tops, Women's or girls".

#### Style 0045

The second garment is identified as Style 0045 and consists of an underwire bra with panels that descend to the waist, adjustable straps of less than 1 inch, a hook and eye back closure, and front closure laced with a satin ribbon. Heading 6212, HTSUSA, provides for, "Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted." The EN to heading 6212, HTSUS, states, in pertinent part:

This heading covers articles of a kind designed for wear as bodysupporting garments or as supports for certain other articles of apparel, and parts thereof. These articles may be made of any textile material including knitted or crocheted fabrics (whether or not elastic).

The heading includes, *inter alia*:

- (1) Brassieres of all kinds.
- (2) Girdles and panty-girdles.
- (3) Corselettes (combinations of girdles or panty-girdles and brassieres).
- (4) Corsets and corset-belts. These are usually reinforced with flexible metal-lic, whalebone or plastic stays, and are generally fastened by lacing or by hooks.
- (5) Suspender-belts, \* \* \* garters, \* \* \*

The article now in question combines multiple features into one undergarment: a body supporting brassiere (underwire at the cups), adjustable straps, supportive panels that shape and cover the torso and extend below the waist, six "stays" (or boning) which connect the panels, a "lacing" style closure in the front, and a hook/eye style closure in the back. As such, it is most similar to a "corset" which is further supported by the definitions presented in the following lexicographic sources:

Women's one piece sleeveless, laced garment for shaping the figure. Generally a heavily boned, rigid garment worn from 1820s to 1930s. Since 1940s made of lighter-weight elasticized fabrics and called a girdle or foundation garment. *Fairchild's Dictionary of Fashion* 2d Edition.

A stiff shaping garment of the torso, tending to pronounced diminution of the waist and raising of the bust. A variant was used by men as well. *Infra-Apparel*, Richard Martin and Harold Koda (1993), at 47.

Based on these definitions, the "corset" features a combination of body supporting elements that lift the bustline, diminish the waistline, and provide shaping to the torso. The undergarment now in question has center front and rear panels that are constructed of 91 percent nylon and 9 percent spandex knit fabric. The four side panels are constructed of 60 percent nylon and 40 percent spandex fishnet knit fabric. The construction and fabric content provide exceptional body support to the torso. Further, the subject garment shares all of the same features provided in the above definitions of the "corset." In view of the foregoing, we have determined that the subject article is a "corset" and specifically provided for underheading 6212, HTSUSA.

In view of the foregoing, the article identified as Style 0045 is properly classifiable as a "corset" of man-made fibers under subheading 6212.30.0020, HTSUSA. NY G80103 is hereby modified.

#### Holding:

The merchandise identified as Style 5407 is correctly classified in subheading 6114.30.1020, HTSUSA, as "Other garments, knitted or crocheted: Of man-made fibers: Tops, Women's or girls". The general column one duty rate is 32.7 percent *ad valorem*. The textile category is 639.

The merchandise identified as Style 0045 is correctly classified in subheading 6212.30.0020, HTSUSA, which provides for, "Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Corsets, Of man-made fibers." The general column one duty rate is 24 percent *ad valorem*. The textile category is 649.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part

categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

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## PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF DRILL BITS AND ROUTER BITS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to tariff classification of drill bits and router bits.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of drill bits and router bits, and to revoke any treatment Customs has previously accorded to substantially identical transactions. These articles are interchangeable tools for drilling and routing machines used in the manufacture of printed circuit boards. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before November 30, 2001.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103-182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of drill bits and router bits. Although in this notice Customs is specifically referring to one ruling, NY E84599, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In NY E84599, dated July 15, 1999, certain drill bits and router bits were held to be classifiable in subheading 8207.50.80, HTSUS, as interchangeable tools for handtools or for machine-tools, for drilling, other than for rock drilling, and in subheading 8207.90.75, HTSUS, as other interchangeable tools, respectively. This ruling was based on incomplete

information as to the composition of the cutting part of the tools. NY E84599 is set forth as "Attachment A" to this document.

It is now Customs position that these bits are classifiable in subheadings 8207.50.20 and 8207.90.30, HTSUS, respectively, as cutting tools the cutting part of which contains the requisite percent, by weight, of the metals listed in those subheadings. Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY E84599 and any other ruling not specifically identified to reflect the proper classification of the drill bits and router bits pursuant to the analysis in HQ 964755, which is set forth as "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment it previously accorded to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: October 4, 2001.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE  
Washington, DC, July 15, 1999.  
CLA-2-82:RR:NC:1:115 E84599  
Category: Classification  
Tariff No. 8207.50.8000 and 8207.90.7530

MR. TOMMY HOANG  
EMO TRANS INC.  
11100 Hindry Ave.  
Los Angeles, CA 90045

Re: The tariff classification of Bits from Germany.

DEAR MR. HOANG:

In your letter dated July 8, 1999 you requested a tariff classification ruling on behalf of your client Ham Technology.

Literature was submitted for two types of drill bits. The first is a drill bit and the second drill bit is a router bit. Both bits are not suitable for cutting metal. The articles are used in the printed circuit board industry.

The applicable subheading for the Drill bit will be 8207.50.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for Tools for drilling, other than for rock drilling, and parts thereof: Not suitable for cutting metal, and parts thereof \* \* \* Other: The rate of duty will be 2.9% *ad valorem*.

The applicable subheading for the Router Bit will be 8207.90.7530, Harmonized Tariff Schedule of the United States (HTS), which provides for Tools for drilling, other than for rock drilling, and parts thereof: not suitable for cutting metal, and parts thereof: Other \* \* \* Router bits. The rate of duty will be 3.7% *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212-637-7017.

ROBERT B. SWIERUPSKI,  
Director,  
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR:CR:GC 964755 JAS  
Category: Classification

Tariff No. 8207.50.20 and 8207.90.30

TOMMY HOANG  
EMO TRANS L.A., INC.  
11100 Hindry Ave.  
Los Angeles, CA 90045

Re: NY E84599 Revoked; Drill Bits and Router Bits.

DEAR MR. HOANG:

In NY E84599, which the Director of Customs National Commodity Specialist Division, New York, issued to you on July 15, 1999, on behalf of Ham Technology, certain drill bits and router bits for machines used to manufacture printed circuit boards were found to be classifiable in provisions of heading 8207, Harmonized Tariff Schedule of the United States (HTSUS), as tools for drilling, other than rock drilling, and as other interchangeable tools, respectively. We have reconsidered these classifications and now believe that they are incorrect.

*Facts:*

The drill bits and router bits were described in NY E84599 as being for use in the printed circuit board industry and as being unsuitable for cutting metal. No further description was provided. These tools are for drilling and routing machines used in the manufacture of printed circuit boards. Literature submitted with the ruling request described solid carbide high performance micro drills, special drills and special drills with stainless hardened steel shanks. Shank diameter, total length, and other dimensions were specified, but the composition of the cutting part of the tools was not indicated.

The HTSUS provisions under consideration are as follows:

<b>8207</b>	Interchangeable tools for handtools * * * or for machine-tools * * * and rock drilling or earth boring tools; base metal parts thereof:
<b>8207.50</b>	Tools for drilling, other than for rock drilling, and parts thereof:
<b>8207.50.20</b>	With cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten or over 0.1 percent of vanadium
	Other, not suitable for cutting metal:
<b>8207.50.80</b>	Other
<b>8207.90</b>	Other interchangeable tools, and parts thereof:
<b>8207.90.30</b>	Other cutting tools with cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten or over 0.1 percent of vanadium
	Other:
<b>8207.90.75</b>	Other

*Issue:*

Determining the composition of the cutting parts of the drill bits and router bits.

*Law and Analysis:*

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The ENs on p.1204 in part state that the tools of heading 8207 may be either one-piece or composite articles. The one-piece tools, made wholly from one material, are generally of alloy steel or steel with a high carbon content. Composite tools consist of one or more working parts of base metal, of metal carbides or of cermets, of diamond or of other precious or semi-precious stones, attached to a base metal support, either permanently, by welding or inseting, or as detachable parts.

The classifications expressed in NY E84599 were those recommended in your ruling request of July 8, 1999. Subsequently, however, Ham Technology responded to a facsimile inquiry, dated October 26, 2000, from Customs New York office and provided a safety data sheet on the material from which these bits are made. Under the designation Hardmetal, the data sheet indicates the material may also be referred to as cemented carbide or tungsten carbide, the latter with from 3% to 25% cobalt. Similar information from another technical source on carbide tools and related carbide products is a specification identifying a substance with the chemical name "tungsten carbide product with cobalt binder," known variously as Hard Metal, Cemented WC and tungsten carbide. This material is used, among other things in metalworking tools. The specification indicates, for example, that tools of this material are between 2 to 30 percent by weight cobalt and between 70-98 percent, by weight, tungsten carbide. The available evidence now suggests that the drill bits and router bits the subject of NY E84599 may have cutting parts with the requisite percent by weight of tungsten specified in subheadings 8207.50.20 and 8207.90.30, HTSUS.

*Holding:*

Under the authority of GRI 1, drill bits and router bits the subject of NY E84599 are provided for in heading 8207. The drill bits are classifiable in subheading 8207.50.20, HTSUS, and the router bits in subheading 8207.90.30, HTSUS. NY E84599, dated July 15, 1999, is revoked.

JOHN DURANT,

*Director,*

*Commercial Rulings Division.*

## DATES AND DRAFT AGENDA OF THE TWENTY-EIGHTH SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

**AGENCIES:** U.S. Customs Service (Department of the Treasury) and U.S. International Trade Commission.

**ACTION:** Publication of the dates and draft agenda for the twenty-eighth session of the Harmonized System Committee of the World Customs Organization.

**SUMMARY:** This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

**DATE:** October 17, 2001

**FOR FURTHER INFORMATION CONTACT:** Myles B. Harmon, Director, International Agreements Staff, Office of Regulations & Rulings, U.S. Customs Service (tel: 202-927-2255 & fax: 202-927-1873), or Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (tel: 202-205-2592 & fax: 202-205-2616).

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium. The next session of the HSC will be the twenty-eight, and it will be held from November 12 to 23, 2001.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418), the Department of the Treasury, represented by the U.S. Customs Service, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. government at the sessions of the HSC. The U.S. Customs Service representative serves as the head of the delegation at the sessions of the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either the Customs Service or the ITC. Comments on agenda items may be directed to the above-listed individuals.

Dated: October 22, 2001.

MYLES B. HARMON, DIRECTOR,  
*International Agreements Staff,*  
*Office of Regulations & Rulings.*

[Attachment]

Attachment

**DRAFT AGENDA FOR THE TWENTY-EIGHTH SESSION OF THE  
HARMONIZED SYSTEM COMMITTEE**

Tuesday, November 13 (10 am.) to Friday, November 23, 2001

N.B. Questions under Agenda Item VI will be examined first by the presessional Working Party (on Monday 12 November 2001 at 10 a.m.).

I.

*ADOPTION OF THE AGENDA*

Draft Agenda .....	NC0437E1
Draft Timetable .....	NC0438B1

II.

*REPORT BY THE SECRETARIAT*

1. Position regarding Contracting Parties to the HS Convention and related matters .....	NC0439E1
2. Report on the meetings of the Policy Commission (45th Session) and the Council (97th and 98th Sessions) .....	NR0190E1
3. Approval of decisions taken by the Harmonized System Committee at its 27th Session .....	NG0027E1 NC0441E1
4. Technical assistance activities of the Nomenclature and Classification Sub-Directorate .....	NC0442E1
5. Co-operation with other international organizations .....	NC0443E1
6. New information provided on the WCO web site .....	NC0444E1
7. Survey on Free Trade Agreements .....	NC0445E1
8. Survey on the capacity of HS Contracting Parties to use the HS Discussion Forum .....	NC0446E1
9. WCO policy with regard to the publication of late documents .....	NC0456E1
10. Approval of Review Sub-Committee Reports .....	NC0457E1
11. Other .....	

III.

*GENERAL QUESTIONS*

1. UN/SPSC Commodity Classification System .....	NC0448E1
2. Establishment of a correlation between the Harmonized System and various international conventions .....	NC0449E1 NC0499E1
3. Proposed amendment of the Compendium of Classification Opinions .....	NC0454E1

IV.

*RECOMMENDATIONS*

1. Draft Recommendation of the Customs Co-operation Council on the insertion in national statistical nomenclatures of subheadings to facilitate the monitoring and control of products specified in the draft Protocol concerning firearms covered by the UN Convention against transnational organized crime .....	NC0450E1
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V.

*REPORT OF THE HS REVIEW SUB-COMMITTEE*

1. Report of the 24th Session of the HS Review Sub-Committee .....	NR0205E2
2. Matters for decision by the Harmonized System Committee .....	NC0452E1

## VI.

*REPORT OF THE PRESESSIONAL WORKING PARTY*

- |  |          |
|--|----------|
| 1. Amendments to the Explanatory Notes to headings 87.03 and 87.04 .   | NC0459E1 |
| 2. Amendments to the Compendium of Classification Opinions arising from the classification of "MYKON ATC Blue" in subheading 3824.90 ..  | NC0460E1 |
| 3. Amendments to the Compendium of Classification Opinions and the Explanatory Notes arising from the classification of play tents and play houses in subheading 9503.90 ..... | NC0461E1 |

## VII.

*FURTHER STUDIES*

- |  |   |
|--|---|
| 1. Formal adoption of amendments to the Explanatory Notes provisionally adopted at the 27th Session .....  | NC0462E1  |
| 2. Classification of certain repeaters used in LAN systems: Reservation by the US Administration .....   | NC0463E1  |
| 3. Classification of certain chemical products relating to the Chemical Weapons Convention .....   | NC0464E1  |
| 4. Guidelines with regard to the possible application of GRIs 3(a) and 3(c) in the context of the classification of certain chemical products .....                                  | NC0465E1  |
| 5. Classification of bakers' wares (waffles) .....   | NC0466E1  |
| 6. Amendment of the Explanatory Note to heading 56.06 with a view to defining the scope of the expression "chenille yarn" .....  | NC0467E1  |
| 7. Classification of certain multifunctional digital copiers .....   | NC0468E1  |
| 8. Deleted   |   |
| 9. Classification of flash electronic storage cards .....  | NC0470E1  |
| 10. Classification of DVD drives and DVD players, including game players .....   | NC0471E1  |
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| 18. Classification of a passenger motor vehicle with a "hybrid" power system .....   | NC0479E1  |
| 19. Study to distinguish the processors and coprocessors of heading 84.71 from those of heading 85.42 in the context of the amendment of the Explanatory Note to heading 84.71 ..... | NC0480E1  |

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|--|--|
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| 2. Classification of car safety seats for infants and toddlers .....   | NC0423E1<br>(HSC/27)                         |
| 3. Classification of certain modified starches or sizing preparations ....   | NC0483E1                                     |
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| 6. Possible amendment of the Explanatory Notes to headings 84.50 and 84.51 to clarify the classification of laundry type and industrial washing machines (Proposal by the Egyptian Administration) ..... | NC0486E1                                     |
| 7. Deleted   |  |
| 8. Possible amendment of the Explanatory Notes to Chapter 48 to clarify the classification of so-called "photo-copying paper" (Proposed by the Egyptian Administration) .....                            | NC0488E1                                     |
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## X.

## DATES OF THE NEXT SESSIONS

# United States Court of International Trade

One Federal Plaza  
New York, N.Y. 10278

*Chief Judge*

Gregory W. Carman

*Judges*

Jane A. Restani  
Thomas J. Aquilino, Jr.  
Donald C. Pogue  
Evan J. Wallach

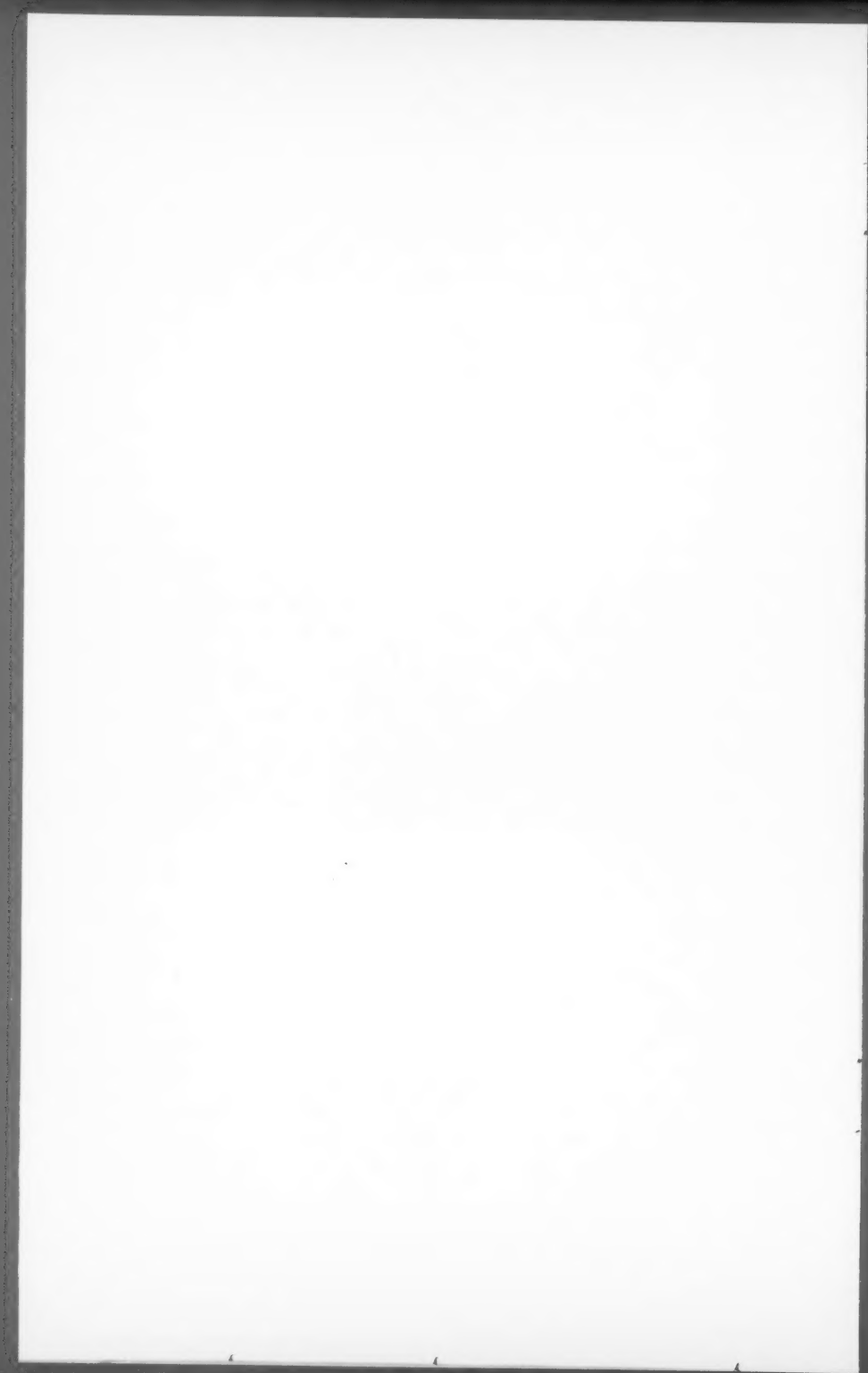
Judith M. Barzilay  
Delissa A. Ridgway  
Richard K. Eaton

*Senior Judges*

Herbert N. Maletz  
Nicholas Tsoucalas  
R. Kenton Musgrave  
Richard W. Goldberg

*Clerk*

Leo M. Gordon



# Decisions of the United States Court of International Trade

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[PUBLIC VERSION]

(Slip Op. 01-87)

ALLEGHENY LUDLUM CORP, ET AL., PLAINTIFFS v.  
UNITED STATES, DEFENDANT, AND ALZ N.V., DEFENDANT-INTERVENOR

Court No. 99-06-00362

[The Department of Commerce's Remand Determination is Affirmed.]

(Decided July 18, 2001)

Collier Shannon Scott, PLLC (David A. Hartquist, Paul C. Rosenthal, R. Alan Luberd, Lynn Duffy Maloney, and John M. Herrmann), for Plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General; David M. Cohen, Director; U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Michele D. Lynch and Lucius B. Lau); Arthur D. Sidney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

O'Melveny & Myers LLP (Peggy A. Clarke), for Defendant-Intervenor.

## I

### INTRODUCTION

WALLACH, *Judge*: Plaintiffs dispute the United States Department of Commerce International Trade Administration's ("Commerce" or "the Department") finding in the *Final Results of Redetermination Pursuant to Court Remand, Allegheny Ludlum Corp., et al. v. United States* (Dep't Commerce 2000) ("*Remand Determination*") that certain programs or transactions did not confer countervailable subsidies upon a Belgian producer of stainless steel coiled plate. Plaintiffs' challenge follows the court remand of Commerce's decision in *Final Affirmative Countervailing Duty Determination; Stainless Steel Plate in Coils from Belgium*, 64 Fed. Reg. 15567 (1999) ("*Final Determination*"). See *Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141 (CIT 2000). Familiarity with the court's earlier opinion is presumed.

The court finds that Commerce has remedied the defects in its earlier decision by specifically articulating the basis for not including the Gov-

ernment of Belgium's 1984 purchase of stock in the Belgian steel company Siderurgie Maritime SA ("Sidmar") in its countervailing subsidy investigation, and affirms the Department's *Remand Determination*.

## II

### STANDARD OF REVIEW

In reviewing Commerce's determination, the court "shall hold unlawful any determination, finding, or conclusion found \* \* \* to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404-5, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). "Substantial evidence is something more than a 'mere scintilla,'" and must be enough evidence to reasonably support the Department's conclusion. *Id.* at 405, 636 F. Supp. at 966.

## III

### BACKGROUND

On March 31, 1998, Plaintiffs filed a countervailing duty petition with Commerce that alleged a Belgian producer of stainless steel plate in coils, ALZ N.V. ("ALZ"), received an unfair benefit from various subsidies provided by the Government of Belgium ("GOB"), the regional Government of Flanders ("GOF") and the European Commission ("EC"). See *Initiation of Countervailing Duty Investigations: Stainless Steel Plate in Coils from Belgium, Italy, the Republic of Korea, and the Republic of South Africa*, 63 Fed. Reg. 23272 (Dep't Commerce 1998) ("*Initiation Notice*"). In Plaintiffs' initial petition, Plaintiffs also alleged that Belgian steel company Sidmar received subsidies from the GOB that were attributable to ALZ.

However, in the initial petition, Plaintiffs did not specifically identify the GOB's 1984 investments in Sidmar as a subsidy, and only made reference to them in a discussion of the overall Belgian Steel Industry. Commerce did not list these investments as subject to investigation in its *Initiation Notice* of April 28, 1998. See *Initiation Notice*, 63 Fed. Reg. at 23273. Moreover, Plaintiffs did not challenge or comment upon Commerce's failure to investigate these investments until just prior to the verification, when they requested that Commerce examine the terms of the 1984 debt-to-equity conversion stock purchase (the "infusion") and verify the methodology used by the GOB to arrive at the value per share. See Letter from Petitioners to Commerce of November 6, 1998 at 9-10.

On August 28, 1998, Commerce issued its *Preliminary Determination*.<sup>1</sup> It issued its *Final Determination* on March 19, 1999 and declined to investigate that question because, it said, the infusion was brought to its attention following the statutory deadline and therefore untimely. See *Final Determination*, 64 Fed. Reg. at 15584 (finding the countervailable subsidy rate for ALZ to be 1.82 percent, *ad valorem*). However, based on Plaintiffs' challenge, the court concluded that the *Final Determination* was materially flawed in several respects and remanded it back to Commerce with specific instructions to cure these defects. See *Allegheny Ludlum Corp.*, 112 F. Supp. 2d 1141, and Order of June 7, 2000 ("the Order").<sup>2</sup> For purposes of Plaintiffs' current challenge, the critical error identified upon remand was Commerce's failure to explain or justify its unwillingness to investigate the GOB's 1984 purchase of stock in Sidmar, despite an apparent statutory obligation to do so under 19 U.S.C. § 1677d. See *Allegheny Ludlum*, 112 F. Supp. 2d at 1149-51.

On September 5, 2000, Commerce issued its *Remand Determination* in which it addressed each of the instructions. However, Plaintiffs object to Commerce's response to the court's first and second instructions, which concern the infusion. In short, Plaintiffs claim that Commerce failed to abide by the terms of the Order and that a further remand is necessary.

<sup>1</sup> *Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Stainless Steel Plate in Coils From Belgium*, 63 Fed. Reg. 47239, 47245 (1998) ("Preliminary Determination").

<sup>2</sup> In relevant part, the Order directed Commerce to:

(1) either conform its decision not to accept Plaintiffs' new subsidy allegation (concerning the 1984 equity infusion in Siderurgie Maritime SA ("Sidmar")) with its prior decision to investigate untimely allegations concerning the Government of Belgium's 1987 and 1993 sales of ALZ stock to Sidmar, or explain on the record the reasons for this apparent inconsistency. To ensure consistency with other investigations, Commerce is also instructed to explain how its decision on remand comports with other instances where it has used its discretion to similarly reject or accept untimely allegations;

(2) examine the record evidence concerning the 1984 equity infusion in Sidmar that it collected (or was put before it) during its investigation in this matter and, in light of 19 U.S.C. § 1677d (1994) and 19 C.F.R. § 351.311 (2000), discuss whether it had an obligation to investigate this transaction as a potential subsidy for the *Final Determination*. Should it find in the affirmative, Commerce is instructed to reopen its investigation, determine whether this transaction constitutes a countervailable subsidy, and (to the extent it does) adjust ALZ's net countervailable subsidy rate accordingly;

(3) consider the significance of the statement in Sidmar's 1994 Financial Statement that Sidfin International ("Sidfin") "is administered by our group only" and determine whether, or how, this affects its conclusion that no countervailable benefit was conferred to Sidmar through the creation of Sidfin. In so doing, Commerce shall examine this statement in light of Sidmar's subsequent explanation (noted in Sidmar's Verification Report at 6) that this statement was "perhaps a slight exaggeration intended to strengthen Sidmar's company image," as well as any other relevant evidence;

(4) clarify its methodology for determining whether a benefit was conferred to Sidmar through the creation of, and its participation in, Sidfin. Specifically, Commerce is instructed to state *why* it examined "ownership," "control," and "profit" in determining whether a countervailing benefit had been conferred, and clarify the relative importance that it attributed to each of these or other factors. Should Commerce determine upon remand that Sidmar actually controlled Sidfin, Commerce shall also discuss, in light of its methodology, whether (and if so, how) Sidmar's control affects its determination that a benefit had not been conferred upon Sidmar; and

(5) should Commerce reverse its prior finding on remand and decide that a financial contribution was conferred to Sidmar through the Sidfin joint venture, examine and decide upon the propriety of using Plaintiffs' suggested share valuation methodology for (a) deciding whether a "benefit" was conferred for purposes of 19 U.S.C. § 1677(5)(E)(i) (1994); and, (b) if applicable, valuing the amount of subsidy conferred by Gimvinduul.]

## IV

## ARGUMENTS

## A

## PLAINTIFFS ARGUE COMMERCE HAS NOT COMPLIED WITH THE COURT'S REMAND ORDER OR THE STATUTE.

Plaintiffs argue that "Commerce's analysis and conclusion" in the *Remand Determination* "are erroneous because they ignore the two-pronged nature of the Court's remand instructions." Plaintiffs' Response to the Commerce Department's Final Results of Redetermination Pursuant to Court Remand ("Plaintiffs' Response") at 2. The Plaintiffs assert that Commerce was instructed to engage in a two step analysis, which first required Commerce to determine whether it was obligated under 19 U.S.C. § 1677d to examine the infusion. If this threshold question was answered in the affirmative, Commerce was then required to reopen its investigation to include the infusion. Therefore, Plaintiffs argue that Commerce improperly reached a conclusion regarding the existence of a subsidy through its "threshold inquiry into whether it had a statutory obligation, under the facts and circumstances presented, to include a 'possible subsidy' in its investigation." *Id.* Plaintiffs object to Commerce's conclusion that it was not obligated to reopen its investigation under § 1677d based on its view that since the infusion did not confer a benefit it could not possibly be a subsidy. Plaintiffs aver that this conclusion was based on a "backwards, result-oriented approach to the issue of Commerce's basic, threshold obligation to investigate a *potential* subsidy practice [that] contravenes the very essence of the Court's remand instructions \* \* \*." *Id.* at 5 (emphasis in original).

Plaintiffs also argue that because Commerce determined there does not appear to be a possible subsidy in the absence of a benefit, Commerce has tacitly admitted that it "had an obligation to investigate this subsidy practice." *Id.* at 6. Plaintiffs cite several aspects of the *Remand Determination* in support of this argument. For example, plaintiffs refer to the *Remand Determination*'s listing of record evidence regarding the infusion and argue that while such evidence is "directly relevant to the initial inquiry into whether to investigate," *id.*, it is not a sufficient basis for Commerce to conclude that there was no subsidy practice at all. Rather, Plaintiffs concede that such a conclusion *could* be reached, but only, they say, *after* a complete § 1677d investigation. Moreover, the Plaintiffs argue that Commerce evaluated the evidence on the merits as it would in a final determination and that "very approach \* \* \* shows that the record evidence should have caused Commerce to include the subsidy in its investigation." *Id.* at 7.

Plaintiffs' final argument is that Commerce's analysis improperly "raise[s] the bar" by making it more difficult to initiate a subsidy investigation and therefore circumvents the language of § 1677d. Plaintiffs maintain that Commerce's analysis unduly requires the petitioners to affirmatively establish a case for countervailability at the time the sub-

sidy is alleged. *Id.* Plaintiffs further assert Commerce's position that "unless evidence indicated that the earlier finding regarding Sidmar's equityworthiness was in error, the Department had no basis to investigate the GOB's purchase of common shares," *Remand Determination* at 36, is unfounded given Plaintiffs' submission of evidence and discussion of *Geneva Steel v. United States*, 20 CIT 1083, 937 F Supp. 946 (1996) to the contrary. Plaintiffs' Response at 8-9. Plaintiffs stress that this reasoning is improper inasmuch as it requires an "affirmative showing of benefit from the outset." *Id.* at 9.

As a result of this allegedly flawed approach, Plaintiffs claim that the second prong of the court's instruction regarding the infusion was improperly ignored, and that had Commerce properly engaged in the initial threshold inquiry regarding its duty to investigate the infusion, it would have necessarily conducted a § 1677d investigation. *See id.* at 9-11. As such, Plaintiffs aver that "Commerce's discussion of whether a benefit existed under the 1984 transaction attempts to analyze several important issues that must be addressed in a further remand." *Id.* at 10.

## B

### DEFENDANT MAINTAINS THAT ITS PREVIOUS DECISION IS SUPPORTED BY THE RECORD EVIDENCE AND THE STATUTE.

Commerce maintains that it rendered its decision in compliance with the Order's instructions. Specifically, Commerce asserts that it "analyzed the 'information and argumentation' that were in the record in light of 19 U.S.C. § 1677d and 19 C.F.R. § 351.311 and explained 'why this evidence would not have triggered inclusion of this potential subsidy in [its] investigation.'" Defendant's Rebuttal Comments to the Plaintiffs' Response to the Final Results of Redetermination Pursuant to Court Remand ("Defendant's Rebuttal") at 5 (quoting *Remand Determination* at 16). Moreover, Commerce acknowledges "that where there is evidence of a possible subsidy, it has a statutory obligation to investigate that subsidy pursuant to 19 U.S.C. § 1677d." *Id.* at 4 (citing *Remand Determination* at 33).

As a result, Commerce asserts that it declined to reopen its investigation based on record evidence which indicates the "1984 investments do not appear to be possible subsidies." *Id.* at 7. In addition, Commerce asserts that in so declining, it did not "raise the bar" for initiating an investigation of a potential countervailable subsidy as Plaintiffs argue. Rather, Commerce says that the evidence of a countervailing subsidy was simply insufficient to initiate an investigation. Moreover, Commerce claims that Plaintiffs' interpretation of its position is erroneous. *Id.* at 7-8. Specifically, Commerce stresses that under the record evidence it found, although there was clearly a financial contribution, "there was no evidence that Sidmar received a benefit from that financial contribution" and "[w]ithout a benefit, the practice cannot be considered a subsidy." *Remand Determination* at 31.

## V

## ANALYSIS

Although Commerce arrived at a conclusion regarding the potential subsidy, without engaging in a § 1677d investigation, its conclusion was warranted under the record evidence and in compliance with the statute and the Order. As the Order stated, Commerce is obligated to adhere to the scheme articulated in 19 U.S.C. § 1677d and 19 C.F.R. § 351.311 and had to

examine the record evidence concerning the 1984 equity infusion in Sidmar that it collected (or was put before it) during its investigation in this matter and, in light of 19 U.S.C. § 1677d (1994) and 19 C.F.R. § 351.311 (2000), discuss whether it had an obligation to investigate this transaction as a potential subsidy for the *Final Determination*. Should it find in the affirmative, Commerce is instructed to reopen its investigation, determine whether this transaction constitutes a countervailable subsidy, and (to the extent it does) adjust ALZ's net countervailable subsidy rate accordingly.

June 7, 2000 Order, paragraph (2).

Thus, Commerce was instructed to determine if the record evidence, when analyzed, gave rise to an obligation to reopen their previous investigation to include the 1984 Sidmar infusion. In relevant part, 19 U.S.C. § 1677d provides as follows:

If, in the course of a proceeding under this subtitle, the administering authority discovers a practice which *appears to be a countervailable subsidy*, but was not included in the matters alleged in a countervailing duty petition \* \* \* then the administering authority—

(1) shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding \* \* \*.

19 U.S.C. § 1677d (1994) (emphasis added). In turn, 19 C.F.R. § 351.311 ("Countervailable subsidy practice discovered during investigation or review") states in relevant part:

(b) *Inclusion in proceeding*. If during a countervailing duty investigation or a countervailing duty administrative review the Secretary discovers a practice that *appears to provide a countervailable subsidy* with respect to the subject merchandise and the practice was not alleged or examined in the proceeding \* \* \* the Secretary will examine the practice, subsidy, or subsidy program if the Secretary concludes that sufficient time remains before the scheduled date for the final determination or final results of review.

(c) *Deferral of examination*. If the Secretary concludes that insufficient time remains before the scheduled date for the final determination or final results of review to examine the practice, subsidy, or subsidy program described in paragraph (b) of this section, the Secretary will:

(1) During an investigation, allow the petitioner to withdraw the petition without prejudice and resubmit it with an allega-

tion with regard to the newly discovered practice, subsidy, or subsidy program; or

(2) During an investigation or review, defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any.

(d) *Notice.* The Secretary will notify the parties to the proceeding of any practice the Secretary discovers \* \* \*.

19 C.F.R. § 351.311 (2000) (emphasis added).

Since the plain language of the statute and regulation only require Commerce to investigate where there is a practice that "appears to be" or "appears to provide" a countervailable subsidy, it follows that Commerce must first determine whether that threshold is met. On this point, the parties appear to agree. However, the parties disagree on the scope of the actual inquiry in which Commerce is obligated to engage.

While Plaintiffs argue that Commerce has exceeded the bounds of the threshold inquiry that § 1677d and the Order required of it, they do not attack the substance of Commerce's analysis. Rather, they contend this analysis is faulty only inasmuch that it assessed the merits of the record evidence before Commerce. In other words, Plaintiffs claim that Commerce conducted its analysis in reverse, arguing that Commerce should have reached a conclusion only following a full § 1677d investigation. Plaintiffs stress that "the statute only requires Commerce to include a practice that 'appears' to be a subsidy, rendering Commerce's analysis on remand contrary to both the Court's instructions and the express statutory language." Plaintiffs' Response at 6. As Plaintiffs view the situation, "[u]nder Commerce's logic, because the agency affirmatively found that no subsidy existed, it had no obligation to examine an 'apparent' subsidy practice in its investigation." *Id.* at 5.

Although Plaintiffs assert the standard to determine if the infusion conferred a benefit is whether there is a "reasonable basis to believe or suspect" that such a benefit exists, through the course of their argument, they in essence interpret the term "appears" in both 19 U.S.C. § 1677d and C.F.R. § 351.311 to mean *immediately appears from the evidence in the record, without further analysis or consideration.* See Plaintiffs' Supplemental Memorandum Regarding the Commerce Department's Final Results of Redetermination Pursuant to Court Remand ("Plaintiffs' Supplemental Brief") at 2 (citing *Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments*, 54 Fed. Reg. 23366 (Dep't Commerce 1989) ("1989 Proposed Regulations") (proposed 19 C.F.R. § 355.44(e)(3)) and 19 C.F.R. § 351.507(a)(7)). Therefore, the Plaintiffs fault Commerce for assessing the record evidence beyond its immediate suggestion of an apparent subsidy. Under this reasoning, Commerce's analysis, which dispels any

appearance that a subsidy existed, is an admission that the subject practice "appears" to be a subsidy.<sup>3</sup>

#### A

##### THE BOUNDS OF COMMERCE'S § 1677d THRESHOLD INQUIRY CANNOT BE AS NARROWLY DEFINED AS PLAINTIFFS SUGGEST.

Both the controlling statute and its implementing regulation are silent as to the level of inquiry required to determine whether the term "appears" is satisfied and the court is not aware of any case law or legislative history that discusses the term in this context. For example, the Senate Report on the relevant section provides:

Section 283(b) amends section 775 of the 1930 Tariff Act to provide that, where Commerce discovers during an investigation or review that a subsidy is in violation of Article 8, or appears to be countervailable despite not having been included in the countervailing duty petition, it shall include the subsidy in the investigation.

Sen. Rep. No. 103-412 at 106 (1994); *see also* H.R. Rep. No. 103-826 at 127 (1994). Hence the court is left to interpret this term against the overall statutory scheme.

In that context, the court concludes that the term "appears" cannot be construed as broadly as Plaintiffs demand. Plaintiffs' argument regarding the permissible scope of Commerce's initial inquiry is unpersuasive. Endorsing Plaintiffs' interpretation would force Commerce to engage in a complete countervailing duty investigation in any instance where there is even the slightest suggestion that a certain business practice is a countervailable subsidy.

This court is guided by the Federal Circuit's decision in *American Lamb Co. v. United States*, in which the court determined that the International Trade Commission ("ITC") is permitted to weigh "all evidence in applying the 'reasonable indication' standard of 19 U.S.C. § 1673b(a) in a preliminary investigation." *American Lamb Co. v. United States*, 785 F.2d 994, 997 (Fed. Cir. 1986). In *American Lamb*, the petitioners sought to have the ITC reconsider its decision not to conduct an antidumping investigation based on a negative preliminary determination. The controlling statute, 19 U.S.C. § 1673b, requires the ITC to conduct a full antidumping investigation where there is a "reasonable indication"

<sup>3</sup>Indeed, under this line of reasoning, it would follow that if Commerce is obligated to terminate its threshold inquiry following any possibility that an equity infusion is a countervailable subsidy, any further inquiry necessarily "raises the bar."

of injury based on a preliminary investigation<sup>4</sup>. The lower court concluded that the ITC should have initiated an investigation if the petition adequately demonstrated a "mere possibility" that an injury was sustained. *American Lamb*, 785 F.2d at 1001. In addition, the lower court concluded that the ITC was barred from weighing any negative evidence, thereby requiring "an affirmative preliminary determination \* \* \* whenever information accompanying a petition raises the mere 'possibility' of material injury, regardless of any contrary evidence." *Id.* at 1001. In reversing the lower court's decision, the Federal Circuit looked to the legislative history of the statute and the costly nature of antidumping investigations, stating:

[T]he notion that allegations in a petition found unsupportable because of overwhelming contradictory evidence should nonetheless result in a full investigation and potential imposition of provisional remedies is directly contrary to Congress' intent, as above indicated, of eliminating "unnecessary and costly investigations" and the "impediment to trade" that would reside in an unwarranted imposition of provisional remedies. Considering and weighing, under ITC's guidelines, all evidence gathered within the 45 days available for conducting a preliminary investigation, on the other hand, effectuates that legislative intent.

*Id.* at 1004.

Although the Federal Circuit was guided by statutory language and legislative history that are absent from the current scenario, the underlying logic is applicable. Countervailing duty investigations, like antidumping investigations, are costly and time consuming. Surely, they warrant a sufficient factual basis for their initiation. Although § 1677d offers a petitioner the opportunity to call Commerce's attention to a potentially countervailable subsidy that was discovered during the course of an ongoing countervailing duty investigation, it does not force Commerce to fully investigate any subsidy. Rather, Commerce must review the record evidence to determine whether the business practice "appears" to be a countervailable subsidy. See 19 U.S.C. § 1677d; 19 C.F.R. § 351.311. This review must logically afford Commerce sufficient latitude to weigh and analyze both negative evidence and positive evidence. Moreover if, as Plaintiffs argue, Commerce's determination of whether a benefit was conferred is governed by the "reasonable basis to believe or

<sup>4</sup> 19 U.S.C. § 1673b provides, in relevant part:

(a) Determination by Commission of reasonable indication of injury.

(1) General rule. Except in the case of a petition dismissed by the administering authority under section 1673a(c)(3) of this title, the Commission, within the time specified in paragraph (2), shall determine, based on the information available to it at the time of the determination, whether there is a reasonable indication that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of the subject merchandise and that imports of the subject merchandise are not negligible. If the Commission finds that imports of the subject merchandise are negligible or otherwise makes a negative determination under this paragraph, the investigation shall be terminated.

19 U.S.C. § 1673b (1994).

suspect" standard<sup>5</sup>, see Plaintiffs' Supplemental Brief at 2, then the above discussion of *American Lamb* is even more compelling.

The Plaintiffs misconstrue the actual nature of Commerce's analysis. Commerce, contrary to Plaintiffs' characterization, did not require an affirmative showing of a countervailable subsidy. Indeed as Plaintiffs state "nowhere does Commerce indicate that plaintiffs failed to 'allege' the elements of a subsidy (*i.e.*, financial contribution, benefit, and specificity) with respect to the 1984 equity infusion, nor that this allegation was not supported by 'reasonably available' information. \* \* \* Commerce itself provides a litany of all the reasonably available information that accompanied plaintiffs' argument concerning the 1984 infusion." Plaintiffs' Response at 8 (citing *Remand Determination* at 16-19).

Commerce, in fact, considered all the implications that sprang from the record evidence in support of, as well as against, finding a countervailable subsidy. See generally *Remand Determination*. For "while there was evidence of a financial contribution there was no evidence that Sidmar received a benefit from that financial contribution" and "[w]ithout a benefit, the practice cannot be considered a subsidy." *Remand Determination* at 31. Thus while a financial contribution occurred, that contribution did not appear to be a countervailable subsidy when the record evidence was analyzed, revealing the absence of a benefit.

The court does not concur with Plaintiffs that Commerce's analysis unfairly bypasses the second prong of the Order. Although Commerce engaged in analysis of the record evidence that arrived at a final conclusion, it was not the kind of "substantive analysis reserved for final determinations." Plaintiff's Response at 9. In fact, this analysis was significantly short of that reserved for final determinations. This, however, does not damage the credibility of the conclusion it reached. Rather, the fact that the above analysis is not as intensive as those reserved for final determinations and yet manages to counter the appearance of a countervailable subsidy is indicative of the weak nature of that appearance.

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<sup>5</sup>The 1989 Proposed Regulations provide, in relevant part:  
§§ 355.44 Existence of a countervailable benefit.

(e)(3) The Secretary will not investigate an equity infusion in a firm absent a specific allegation by the petitioner which is supported by information establishing a *reasonable basis to believe or suspect* that a firm has received an equity infusion which provides a countervailable benefit within the meaning of paragraph (e)(1) of this section.

<sup>54</sup> Fed. Reg. at 23380-81. (emphasis added).

Similarly, the *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65348 (Dep't Commerce 1998) provides, in relevant part:

§§ 351.507 Equity.

(a)(7) Allegations. The Secretary will not investigate an equity infusion in a firm absent a specific allegation by the petitioner which is supported by information establishing a *reasonable basis to believe or suspect* that the firm received an equity infusion that provides a countervailable benefit within the meaning of paragraph (a)(1) of this section.

63 Fed. Reg. 65348, 65411; see 19 C.F.R. § 351.507(a)(7) (2000). (emphasis added).

## B

## COMMERCE PROPERLY ABIDED BY THE ORDER AND 19 U.S.C. § 1677d IN DECLINING TO REOPEN ITS INVESTIGATION TO INCLUDE THE 1984 EQUITY INFUSION.

Commerce enumerates the specific evidence relied upon within the record in determining whether the infusion was a possible subsidy practice and provides a thorough analysis of that evidence as well. *See Remand Determination* at 16-20. However Commerce also cautions that although it "attempts to be as inclusive as possible regarding potential subsidy practices which [it] learn[s] about during the course of an investigation \* \* \* this does not mean that the Department goes on 'fishing expeditions,' investigating any and all government practices that might affect the respondents." *Id.* at 12-13. Rather, "the Department pursues those practices where the basic initiation threshold is met, i.e., there must be evidence on the record indicating that the elements necessary for the imposition of countervailing duties are present." *Id.* at 13. As such, Commerce concluded that the evidence on the record failed to satisfy the elements of a possible subsidy. In other words, the infusion did not appear to be a countervailable subsidy practice.

## 1

## EQUITYWORTHY ANALYSIS

The key characteristic of a countervailable purchase of shares is that such a purchase is inconsistent with "commercial considerations." *Remand Determination* at 21. The original measure of what is consistent with commercial considerations is derived from the 1989 Proposed Countervailing Duty Regulations. *See 1989 Proposed Regulations*, 54 Fed. Reg. 23366. Those regulations directed Commerce, in the absence of publicly traded shares with a corresponding market valuation for comparison, to simply make an "equityworthy" determination to establish whether the given share purchase was "consistent with commercial considerations." *Remand Determination* at 20-21. *See also 1989 Proposed Regulations* 54 Fed. Reg. at 23371 § 355.44(e)(1)(ii) ("If there is no market-determined price for a firm's shares (e.g., the firm's shares are not publicly traded), paragraph [§ 355.44(e)(1)(ii)] provides that a government equity infusion constitutes a countervailable benefit if the firm was not equityworthy (i.e., from the standpoint of a reasonable private investor, the firm was not a reasonable investment) and there is a rate of return shortfall within the meaning of § 355.49(e)."). Thus, the purchase of common shares in an equityworthy firm is consistent with commercial considerations.<sup>6</sup>

However, following the court's decisions in *Aimcor v. United States*, 18 CIT 1117, 1124, 871 F. Supp. 447, 454 (1994) ("[W]here a company is

<sup>6</sup> As Commerce's states in its *Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Belgium*, "p]ursuant to the Department's equity methodology, a finding of equityworthiness means that the Department need not inquire further regarding the commercial soundness of a government's purchase of common shares. Hence, we determine that the GOB's 1985 purchase of common shares was consistent with the usual investment practice of private investors in Belgium." 64 Fed. Reg. 15567, 15570 (Dep't Commerce 1999).

equity-worthy, as here, it does not necessarily follow that the purchase of stock from that company will be consistent with commercial considerations.”), *Aimcor v. United States*, 19 CIT 1497, 912 F. Supp. 549 (1995), and *Geneva Steel*, 20 CIT 1083, 937 F. Supp. 946, where special conditions are imposed upon the purchased shares, Commerce could no longer simply conclude its analysis upon finding the target company was equityworthy. Rather, a separate and more exhaustive analysis has to be conducted in order to determine whether the purchase of such shares qualifies as a countervailable subsidy.

Commerce maintains that it assessed the equityworthiness of Sidmar well prior to the instant action in *Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Belgium*, 58 Fed. Reg. 37273 (Dep’t Commerce 1993) (“*Belgian Certain Steel*”). There, in support of their argument that certain practices involving Sidmar and several other companies were in fact countervailable subsidies, the petitioners attacked the equityworthiness of Sidmar during 1984. See *Id.* at 37275.

# i

GIVEN THE HIGHER INITIATION THRESHOLD FOR EQUITYWORTHINESS INVESTIGATIONS AND GIVEN THE FACT COMMERCE’S PREVIOUS FINDING THAT SIDMAR IS NOT UNEQUITYWORTHY IS SUPPORTED AND UNCONTESTED, COMMERCE HAD SUFFICIENT INFORMATION BEFORE IT TO CONSIDER SIDMAR EQUITYWORTHY FOR THE LIMITED PURPOSE OF BUTTRESSING ITS § 1677d ANALYSIS.

However, upon closer examination, the fact Commerce did not actually conduct an investigation to determine whether Sidmar was equityworthy is revealed. In fact, with regard to Sidmar’s equityworthiness during 1984, Commerce stated in *Belgian Certain Steel*:

## *Equityworthiness*

Petitioners have alleged that Sidmar was unequityworthy in 1984[.] \* \* \* We did not initiate an investigation on petitioners’ allegation that Sidmar was unequityworthy because the petition did not contain sufficient evidence to support the allegation \* \* \*. Therefore, we have not made an equityworthiness determination for [this company].

*Belgian Certain Steel*, 54 Fed. Reg. at 37275.

Since Commerce saw, for the three years prior to 1984 (focusing on a three year window is Commerce’s standard practice, see *1989 Proposed Regulations*, 54 Fed. Reg. at 23381, § 355.44(e)(2)), improving rates of return on both equity and return on investment, as well as improving profits and ability to cover costs, it regarded the evidence in support of

petitioners' allegations that Sidmar was unequityworthy as insufficient.<sup>7</sup>

Although this was not a formal equityworthiness investigation, Commerce did rely heavily on two of the four recommended indicators of equityworthiness listed in the 1989 *Proposed Regulations*.<sup>8</sup> Specifically, "[t]he principal criterion is whether a reasonable private investor could expect from the firm a reasonable rate of return within a reasonable period of time." 1989 *Proposed Regulations* 54 Fed. Reg. at 23371 (citations omitted). The 1989 *Proposed Regulations* provide four factors that Commerce may rely on in determining whether this criteria is met, including 1) current and past indicators of a firm's financial health; 2) future financial prospects; 3) recent rate of return on equity; and 4) participation by private investors. See *supra* note 8. It should be noted that these factors were derived individually from separate Commerce investigations and it appears that no one factor is afforded more weight than another. In *Belgian Certain Steel*, Commerce therefore declined to engage in any further inquiry of Sidmar's equityworthiness, having already assessed its equityworthiness against factor #1 (past indicators of financial health) and factor #3 (return on equity).

Although this is not, as Defendant-Intervenor argues, a situation where "the Department had before it all the evidence it examines in making an equityworthiness determination", Defendant-Intervenor's Supplemental Memorandum at 5, it is one in which Commerce pos-

<sup>7</sup> The General Issues Appendix to *Belgian Certain Steel* further explains Commerce's decision not to initiate an equityworthiness investigation of Sidmar:

*Comment 14 (Belgium):* Petitioners argue that there is sufficient information on the record to justify findings of uncreditworthiness and unequityworthiness for Sidmar as well.

Sidmar contends that petitioners' allegations concerning Sidmar's creditworthiness and equityworthiness are incorrect. Sidmar notes that the Department determined at initiation that it was creditworthy and equityworthy. Further, any new allegation contained in a case brief is untimely. According to the Department's regulations at 19 CFR 355.31(c), the Secretary will not consider any subsidy allegation submitted later than 40 days prior to the scheduled date of the preliminary determination.

*DOC Position:* Evidence on the record shows that in the three years prior to 1984, when Sidmar's debt was converted to equity, the company realized improving rates of return on both equity and return on investment. Profits also improved during this period. Additionally, the company was also generating sufficient revenue to meet its costs and fixed financial obligations. In view of this performance, the Department determined not to initiate on petitioners' uncreditworthiness and unequityworthiness allegations. Information supplied in the case brief on these allegations was essentially the same as that supplied in the petition. A small portion of the information in the case brief was new information, which we regarded as untimely. Therefore, we must affirm our determination at initiation that the petition did not provide good cause to initiate an investigation of Sidmar's unequityworthiness or uncreditworthiness.

*Belgian Certain Steel*, 54 Fed. Reg. at 37248.

<sup>8</sup> Under the 1989 *Proposed Regulations* investigations of a company's equityworthiness was guided by four factors:

If there is no market-determined price for a firm's shares (e.g., the firm's shares are not publicly traded), paragraph (e)(1)(ii) provides that a government equity infusion constitutes a countervailable benefit if the firm was not equityworthy (i.e., from the standpoint of a reasonable private investor, the firm was not a reasonable investment) and there is a rate of return shortfall within the meaning of § 355.49(e). Paragraph (e)(2) sets forth the basic criteria the Secretary will use in determining whether a firm is or is not equityworthy. The principal criterion is whether a reasonable private investor could expect from the firm a reasonable rate of return within a reasonable period of time. Subsidies Appendix at 18020. Factors that the Secretary may use to determine whether a firm can generate a reasonable rate of return include: (1) current and past indicators of a firm's financial health (e.g., current ratio, cash flow, debt-equity ratio), adjusted for generally accepted accounting principles where appropriate, see, e.g., *Structural Shapes and Cold-Rolled Carbon Steel Flat-Rolled Products from Korea*, 49 FR 47284 (1984); *Certain Steel Products from South Africa*, 49 FR 32426 (1984); (2) future financial prospects, see, e.g., *Certain Carbon Steel Products from Brazil*, 52 FR 829 (1987); *Stainless Steel Plate from the United Kingdom*, 51 FR 44656 (1986); (3) recent rate of return on equity, see, e.g., *Certain Carbon Steel Products from Brazil*, 49 FR 17988 (1984); and (4) participation by private investors, compare, *Carbon Steel Wire Rod from Trinidad and Tobago*, 49 FR 480 (1984), with *Fresh Atlantic Groundfish from Canada*, 51 FR 10041 (1986). In this regard, the Department intends to continue its practice of assessing the firm as a whole, rather than a particular product line, because a private investor would consider the firm as a whole in making an investment decision. See, e.g., *Fuel Ethanol from Brazil*, 51 FR 3351 (1986).

1989 *Proposed Regulations*, 54 Fed. Reg. at 23371.

sessed a respectable body of evidence weighing in favor of an equity-worthiness finding. And although this is not equivalent to stating Sidmar is equityworthy,<sup>9</sup> it is sufficient for purposes of supporting Commerce's assertion that the subject equity infusion did not appear to be a countervailable subsidy under 19 U.S.C. § 1677d.

Given the higher initiation threshold for countervailing duty investigations in general, the same initiation threshold logically must apply to equityworthiness investigations as well, since the latter is really simply part of the former's overall investigative framework. Commerce's duty to investigate a company's equityworthiness is triggered under § 1677d, as a result of discovering a possible subsidy during the course of an investigation, and under the 1989 *Proposed Regulations*, in response to an allegation raised by petitioner, sufficiently supported by evidence of unequityworthiness. See 19 U.S.C. § 1677d; 1989 *Proposed Regulations*, 54 Fed. Reg. at 23380-81, § 355.44(e)(3). In its *Remand Determination*, Commerce explained that creditworthiness and equityworthiness investigations are governed by a higher initiation standard to compensate for their laborious and difficult nature. *Remand Determination* at 11 ("both creditworthiness and equityworthiness analyses were recognized by the Department as being difficult. As a consequence, the Department set higher initiation thresholds for such allegations."); see also 1989 *Proposed Regulations*, 54 Fed. Reg. at 23371 ("investigations of equity infusions, like investigations of creditworthiness, add substantially to the work involved in a CVD or review.").

Given this higher initiation standard, Commerce must be allowed to rely on a previous finding that a target company was not unequityworthy in the fashion it has here. Forcing Commerce to engage in a complete equityworthiness investigation, after its previous finding that Sidmar was not unequityworthy and the failure of the current and previous petitioners to offer evidence to the contrary, would effectively destroy the higher initiation standard. Such a course of action would allow a petitioner to demand a complete equityworthiness investigation in every instance where a § 1677d investigation might lie. This cannot be the result envisioned by either the regulations or the statute. At the very least, Plaintiffs must offer evidence against Commerce's finding in *Belgian Certain Steel* before demanding Commerce engage in a complete equityworthiness investigation of Sidmar. Since they have not done so here and based on the above analysis of Commerce's equityworthiness finding, the court concludes that Commerce may rely on this finding in support of its decision not to engage in a full countervailing duty investigation of the infusion.

<sup>9</sup> Defendant admits that "[b]ecause the insufficient allegations in *Belgian Certain Steel* did not require that Commerce perform a full and complete investigation into Sidmar's equityworthiness, Commerce cannot say that the finding in *Belgian Certain Steel* that Sidmar was not unequityworthy would be tantamount to a finding that Sidmar was equityworthy in this investigation." Supplemental Memorandum of the United States Responding to February 23, 2001 Court Order at 6.

## 2

## COMMON SHARES

Based on Commerce's original conclusion that Sidmar was equity-worthy in 1984 as stated in *Belgian Certain Steel*, Commerce concludes that it did not have to include the GOB's 1984 purchase of common shares in Sidmar in its investigation. *Remand Determination* at 24-25. As discussed, this conclusion enjoys the support of both Commerce's own regulations, see *1989 Proposed Regulations*, and the relevant case law. See *Aimcor*, 18 CIT at 1124, 871 F. Supp. at 454; *Aimcor*, 19 CIT 1497, 912 F. Supp. 549; *Geneva Steel*, 20 CIT 1083, 937 F. Supp. 946 (1996); *Final Affirmative Countervailing Duty Determination; Stainless Steel Plate in Coils from Belgium*, 64 Fed. Reg. at 15570.

## 3

## PREFERRED SHARES

Despite its finding of equityworthiness, with respect to the GOB's purchase of preferred shares, Commerce, as required, examines each restriction imposed on this class of shares and adjusts the shares' purchase price accordingly. Indeed, Commerce discusses each restriction individually and provides its rationale for any adjustment imposed or forgone. See *Remand Determination* at 23-25. In addition, Commerce distances the purchase of the preference shares from any acknowledged GOB steel industry restructuring initiative. As Commerce states, "[t]he preference shares were purchased through a debt-to-equity conversion, with the GOB assuming BF11,332,804,500 worth of Sidmar debt in exchange for 839,467 preferred shares valued at BF13,500 per share. The preferred shares did not carry any voting rights." *Remand Determination* at 16.

Commerce begins with two reports prepared by the Commissaire-Reviseur, "the statutory auditor, the person responsible for determining and certifying that shares and contributions are properly valued," ALZ August 3, 1998 Supplemental Questionnaire Response at 16. That report established the purchase price for common shares of Sidmar at BF (Belgian Francs) 21,579, based upon Sidmar's "substantial" value and its "profitability" or "yield" value. *Id.* at 16. See *Geneva Steel*, 20 C.I.T. at 1085-86, 937 F. Supp. at 948 (Commerce, with court's approval, uses common shares of target company as best alternative benchmark for assessing the preference shares in the absence of publically traded shares.)

Using this number "without objection" as the starting point for its analysis of the GOB's purchase of Sidmar preference shares, Commerce adjusted that price downward to reflect the inferior aspects of the preferred shares vis a vis the common shares. For example, while Commerce takes note that the subject preferred shares had a dividend cap of

2%,<sup>10</sup> while other common and preferred shares potentially enjoyed greater dividends, it discounts the purchase price by 3% to reflect the shares' absent voting rights as it considers that to be the "one clearly inferior aspect" of the preferred shares.<sup>11</sup> *Remand Determination* at 24.

Nonetheless, on balance, Commerce recognized various other features of the subject preferred shares entitled them to a higher valuation. *See id.* First, the subject shares had the right to priority dividends, meaning that where profits are distributed, the subject preferred share holders receive their portion before the common share holders. *Id.* In addition, the GOB was assured that regardless of price fluctuations in the common shares, the GOB could redeem its preference shares for the original price paid, thereby insulating the GOB from any real risk and assuring that it "would (at least) be made whole". *Id.*

The court takes note of the fact that although the GOB was originally content with the common share price of BF21,579 for the preference shares, that price was ultimately reduced under review of the European Commission ("EC") to BF13,500 per share, as the EC had to determine if the transaction had "elements of support." *Id.* at 18. In fact, the EC, before the GOB purchase even ensued, adjusted the purchase price to reflect the inferior aspects of the shares and to ensure "that no aid measures may be incorporated." *Id.* (quoting September 1984 Report of Commissaire-Reviseur at 11). Therefore "a minus-value of BF 8,079 per share was assigned to the calculated economic value of BF21,579 per share." *Id.* Moreover, the EC noted that this reduction "did not imply that the economic value of BF21,579 per share had been dismissed." *Id.* Hence, the GOB ultimately, "[i]nstead of purchasing 525,178 shares at BF 21,579 per share \* \* \* purchased 839,467 shares at a price of BF13,500 per share." *Remand Determination* at 19.

Despite the fact the preferred shares were limited by a dividend cap, the court finds reasonable Commerce's determination that the purchase of these shares in an equityworthy Sidmar was consistent with commercial considerations. Therefore, "it is evident that the price paid per share by the GOB for Sidmar's preference shares in 1984 was significantly less than the adjusted common share benchmark price." *Id.* at 24. This court finds compelling the GOB's assured priority dividends in conjunction with the assurance of a being made whole upon redemp-

<sup>10</sup> Commerce declined to adjust the purchase price to reflect the 2% dividend cap, because the "[i]nformation on these dividend rights was taken from a 1985 agreement between the GOB and Sidmar relating to the 1985 acquisition of Sidmar's PB's." *Remand Determination* at 24 (internal punctuation omitted). Commerce goes on to state that "[w]e note that it is the Department's practice to consider information available at the time of the equity infusion." *Id.* (citing 1989 Proposed Regulations, 54 Fed. Reg. at 23380-81, § 355.44(e)(2)). Moreover, although Royal Decree No. 245 of December 1983 specified a minimum dividend of 2% prior to the 1984 purchase, it does not necessarily follow that the GOB was aware of the maximum dividend cap at the time of that purchase. Accordingly, the 2% minimum within Royal Decree No. 245 was cast in terms of a benefit and could not have adversely impacted the GOB's understanding of the infusion at the time of the transaction.

<sup>11</sup> The preference share purchase was made pursuant to Royal Decree No. 245 of December 31, 1983, which mandated the shares "(1) confer a preferred dividend of at least 2 percent of the nominal value (i.e., dividends of at least 2 percent would be paid on preference shares before dividends would be paid on any other shares or profit-sharing bonds); (2) have a preferred redemption/reimbursement status, and (3) receive voting rights in certain specified situations. Among these situations, the preference shares would become voting shares after 20 years (unless redeemed)." *Remand Determination* at 19 (citing Royal Decree No. 245).

tion.<sup>12</sup> Those facts, coupled with the EC's downward price adjustment provide sufficient support for the conclusion that the purchase of these preference shares was consistent with commercial considerations. Clearly an investment in an equityworthy company where, at the very least, the investor is guaranteed to recover the initial investment, is not only consistent with commercial considerations but in excess of that threshold.

## VI

### THE 1999 REGULATIONS DO NOT APPLY TO THE CURRENT COUNTERVAILING DUTY INVESTIGATION.

The parties each argue that a different set of regulations govern the current countervailing duty investigation. Commerce argues that the current investigation, whose petition was filed March 31, 1998, is governed by the *1989 Proposed Regulations*, while Plaintiffs argue the current *1999 Regulations*<sup>13</sup> apply.

Prior to the implementation of the *1999 Regulations*, the *Proposed 1989 Regulations*, although never formally implemented, essentially codified Commerce's countervailing duty investigation practices. See *Remand Determination* at 10, n.17 ("While a final version of these regulations was never promulgated, the Department relied on the *1989 Proposed Regulations* as a statement of it [sic] practice in many areas until adoption of its current regulations in November 1998."). However, the *1999 Regulations*, by their terms, apply to countervailing duty investigations initiated after December 28, 1998. See 19 C.F.R. § 351.702(a)(1) (1999). Although the Plaintiffs concede this obvious limitation, they argue that the *1999 Regulations* direct Commerce to apply its terms to a countervailing determination commenced prior to its effective date, when "the previous methodology was *invalidated* by the [Uruguay Round Agreements Act], in which case the Secretary will treat subpart E of this part as a restatement of the Department's interpretation of the requirements of the [Tariff Act of 1930] as amended by the [Uruguay Round Agreements Act]. 19 C.F.R. § 351.702(b) (1999) (emphasis added); see Plaintiffs' Supplemental Brief at 4.

Plaintiffs further argue that as a result of the *1999 Regulations'* expansion of the equityworthiness analysis, they override the *1989 Proposed Regulations*. The *1999 Regulations* require a government entity that made an equity infusion to provide Commerce with a report, prepared prior to the infusion, that contains an objective analysis of the target company. Under the *1999 Regulations*, such a report demonstrates that the government entity behaved as a private investor whose "usual investment practice \* \* \* [is] to evaluate the potential risk versus the ex-

<sup>12</sup> Plaintiffs argue the fact the GOB reaped only the net present value of the preference shares upon redemption in 1991, based on a target redemption date of 2004, undercuts the value of the preference shares' guaranteed minimum return. See *Geneva Steel v. United States*, 914 F. Supp. 563, 600 (CIT 1996). The court does not concur. A reasonable time frame for redemption does not detract from the guaranteed minimum value for the preference shares reflecting the purchase price, irrespective of any fluctuations in Sidmar's economic health. Thus, these preference shares were shielded from erosion in value due to poor performance.

<sup>13</sup> *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65348 (Dep't Commerce 1998) ("*1999 Regulations*").

pected return." 1999 Regulations, 63 Fed. Reg. at 65373. In the absence of such a report, it "is unlikely that [Commerce] would find that the infusion was in accordance with the usual investment practice of a private investor." *Id.* Plaintiffs also direct the court's attention to Commerce's comment that the revised equityworthiness evaluation process "better reflects the principles set forth in the statute, [Statement of Administrative Action], and the [Agreement on Subsidies and Countervailing Measures]. \* \* \* *Id.* at 65372. Based on this statement, the Plaintiffs argue that "Commerce officially found that the equityworthiness analysis of the 1989 Proposed Regulations does not properly effectuate" the Tariff Act of 1930 and Commerce's own regulations and therefore the 1999 Regulations control. Plaintiffs' Supplemental Brief at 6. Plaintiffs additionally point out that the Uruguay Round Agreements Act changed the statutory language regarding the investigation of equity infusions, so that Commerce no longer judged if the infusion was "inconsistent with commercial considerations", 19 U.S.C. § 1677(5)(A)(ii)(I) (1994), but rather whether the infusion was "inconsistent with the usual investment practice of private investors \* \* \*" 19 U.S.C. § 1677(5)(E)(i) (2000). They claim the new language, in conjunction with the additional objective report requirement of the 1999 Regulations, supports their conclusion. If applicable, the 1999 Regulations would most likely demand a formal equityworthiness investigation. Indeed, in the instant case, the GOB did not prepare such a report, and as conceded by Commerce, "consistent with [the 1999 Regulations], the GOB's actions were not consistent with those of a reasonable private investor." *Remand Determination* at 22.

However, Plaintiffs misconstrue the 1999 Regulations analysis as a wholesale invalidation of the older analysis. Instead, the 1999 Regulations simply build upon the older analysis with the new objective report factor.<sup>14</sup> Moreover, Commerce simply states this revised analysis "better reflects" the 1930 Tariff Act and Commerce's obligations under the Uruguay Round Agreement Act. This language is not tantamount to an

<sup>14</sup> In fact, aside from the added paragraph concerning an objective investment report, the equityworthiness standards in the 1999 Regulations are essentially identical to those within the 1989 Proposed Regulations:

(4) *Equityworthiness.*—(i) *In general.* The Secretary will consider a firm to have been equityworthy if the Secretary determines that, from the perspective of a reasonable private investor examining the firm at the time the government-provided equity infusion was made, the firm showed an ability to generate a reasonable rate of return within a reasonable period of time. The Secretary may, in appropriate circumstances, focus its equityworthiness analysis on a project rather than the company as a whole. In making the equityworthiness determination, the Secretary may examine the following factors, among others:

(A) Objective analyses of the future financial prospects of the recipient firm or the project as indicated by, *inter alia*, market studies, economic forecasts, and project or loan appraisals prepared prior to the government-provided equity infusion in question;

(B) Current and past indicators of the recipient firm's financial health calculated from the firm's statements and accounts, adjusted, if appropriate, to conform to generally accepted accounting principles;

(C) Rates of return on equity in the three years prior to the government equity infusion; and

(D) Equity investment in the firm by private investors.

(ii) *Significance of a pre-infusion objective analysis.* For purposes of making an equityworthiness determination, the Secretary will request and normally require from the respondents the information and analysis completed prior to the infusion, upon which the government based its decision to provide the equity infusion (*see*, paragraph (a)(4)(i)(A) of this section). Absent the existence or provision of an objective analysis, containing information typically examined by potential private investors considering an equity investment, the Secretary will normally determine that the equity infusion received provides a countervailable benefit within the meaning of paragraph (a)(1) of this section. The Secretary will not necessarily make such a determination if the absence of an objective analysis is consistent with the actions of reasonable private investors in the country in question.

1999 Regulations, 63 Fed. Reg. at 65410-11.

official conclusion that the 1989 *Proposed Regulations* analysis failed to properly effectuate the Act, nor it is it strong enough to even *imply* that the older analysis is invalidated.

To conclude otherwise would be to open the door to retroactive application of the 1999 *Regulations* in any case where they build upon their predecessor. Plaintiffs simply cannot rely on the 1999 *Regulations* to force Commerce to engage in a full equityworthiness investigation; the current investigation is properly governed by their predecessor.

## VI

### CONCLUSION

For the foregoing reasons, the court finds that Commerce's Remand Determination is supported by substantial evidence and is otherwise in accordance with the law.<sup>15</sup>

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### [PUBLIC VERSION]

(Slip Op. 01-92)

AUSIMONT SPA AND AUSIMONT USA, PLAINTIFFS *v.* UNITED STATES,  
DEFENDANT, AND E.I. DUPONT DE NEMOURS, DEFENDANT-INTERVENOR

Court No. 98-10-03063

[Plaintiffs' motion for judgment upon the agency record granted in part, denied in part, and remanded to Commerce.]

(Dated August 2, 2001)

*MRC Inc. (John Hoellen)*, Washington, D.C., for plaintiffs.

*Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Lucius B. Lau*), for defendant.

*Wilmer Cutler & Pickering (Ronald I. Meltzer, John D. Greenwald, Francesca E. Bignami, and Christopher J. Kent)*, Washington, D.C., for defendant-intervenor.

### OPINION

MUSGRAVE, *Judge*: Plaintiffs Ausimont SpA and Ausimont USA ("Ausimont") move for Rule 56.2 judgment upon the agency record for the August 1, 1996 through July 31, 1997 review period ("POR") compiled by the International Trade Administration, United States Department of Commerce ("Commerce") *sub nom.* *Granular Polytetrafluoroethylene Resin From Italy: Final Results of Antidumping Duty Administrative*

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<sup>15</sup> The court is aware of the recent preliminary determination in *Stainless Steel Plate in Coils from Belgium: Preliminary Results of Countervailing Duty Administrative Review*, 66 Fed. Reg. 20425 (Dep't Commerce 2001) ("Preliminary Results") within which Commerce found the subject infusion countervailable. The court, however, notes the fact that the Preliminary Results are based on the 1999 *Regulations*, not the 1989 *Proposed Regulations*, and therefore regards that investigation as separate with unique circumstances and issues.

*Review*, 63 Fed. Reg. 49080 (Sep. 14, 1998) ("Final Results"). The Defendant United States (the "government") and the Defendant-Intervenor E.I. DuPont de Nemours ("DuPont") urge that the *Final Results* be sustained as published.

Two issues are presented for consideration: (1) whether the "normal value"<sup>1</sup> ("NV") of the subject merchandise was based on home market sales which were made outside the ordinary course of trade or not in the usual commercial quantities, and (2) whether it was improper not to include imputed credit expenses and inventory carrying costs in the denominator of the constructed export price ("CEP") profit allocation ratio ("CEP profit"). The first issue requires remand for further proceedings not inconsistent with this opinion. Commerce's treatment of CEP profit is sustained.

#### BACKGROUND

Since 1988, Ausimont USA has imported polytetrafluoroethylene ("PTFE") subject to *Granular Polytetrafluoroethylene Resin From Italy: Antidumping Duty Order*, 53 Fed. Reg. 33163 (Aug. 30, 1988). In 1993, Commerce determined that "wet reactor bead" constituted "imported parts and components" of granular PTFE resin and that the value-added difference in transforming the one into the other was "small" and that therefore the outstanding order encompassed wet reactor bead. *Granular Polytetrafluoroethylene Resin From Italy: Final Affirmative Determination of Circumvention of Antidumping Duty Order*, 58 Fed. Reg. 26100 (Apr. 30, 1993) ("Circumvention Determination"). See 19 U.S.C. § 1677j (1988). That determination was sustained in *Ausimont v. United States*, 19 CIT 151, 882 F. Supp. 1087 (1995).

The instant POR was publicly initiated<sup>2</sup> on September 25, 1997 via a questionnaire issued to Ausimont SpA containing a glossary which read in part: "[i]n calculating [NV], the Department will consider only those sales in the comparison market that are \* \* \* made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product." Letter with Questionnaire from Commerce to Ausimont of 9/24/97 app. I at 10 (PDoc 3, Fiche 4, Fr. 19). See Def's<sup>3</sup> PubApp 3 at app. I. Ausimont responded on November 6, 1997 with "diskettes and print-outs \* \* \* contain[ing] a sale-by-sale listing of all virgin and filled PTFE

<sup>1</sup> "Normal value" is "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i) (1994). "Foreign like product" is merchandise which is produced in the same country and by the same person and which is identical in physical characteristics to the subject merchandise or is "like" subject merchandise in component material and in purposes used, and either approximates equal commercial value of subject merchandise or is reasonably determined, by Commerce, to be comparable to subject merchandise. 19 U.S.C. § 1677(16) (1994).

<sup>2</sup> 62 Fed. Reg. 50292 (Sep. 25, 1997). See 19 CFR 351.215(b) (1997). Administrative review assesses the amount by which the home market NV of subject merchandise exceeds its "export price" ("EP") or, if circumstances warrant, its CEP and establishes the deposit rate for future entries. See generally 19 U.S.C. §§ 1675(a)(2)(A) and (C), 1677(35)(A), 1677a, 1677b (1994).

<sup>3</sup> Ausimont and the government are abbreviated "Pls" and "Def" in references to their briefs. References to the public and confidential record information are to the official record ("PDoc" and "CDoc", respectively), as microfiche, with occasional references to public and confidential information as appended to the parties' briefs, denoted herein as "PubApp" and "ConfApp".

granular resin, plus wet reactor bead, sold in Italy during the period" and explanation: that granular PTFE resin is sold in a polyethylene-lined drum and "wet reactor bead is sold in a bag"; that all of Ausimont SpA's customers constituted "one class of customers only—unrelated fabricators who transform granular PTFE resin into semifinished and finished manufactured products"; and that there was "one channel of distribution only—shipment of orders directly from Ausimont's plant or warehouse to the customers" on a "delivered basis" via unrelated common carrier. Letter with Questionnaire Response from Ausimont to Commerce of 11/06/97 ("QR 1") (PDoc 13, Fiche 5, Frs. 1, 16, 26, 29, 32, 36, 38, 45; CDoc 1, Fiche 13, Frs. 1, 16, 26, 29, 32, 36, 38, 45). See Def.'s ConfApp 1.

On February 23, 1998, Commerce sent a supplemental questionnaire and matching instructions to Ausimont requiring that it

note that \* \* \* data is also required in the U.S. and comparison market sales listings for wet reactor bead products in both markets[, e]nsure that you have provided home market sales of all products that can be matched to reactor bead that is further manufactured in the United States[, ] and provide a complete description of the home market products and sales that you believe are the most appropriate comparisons to [imported] wet reactor bead \* \* \*.

Letter with Supplemental Questionnaire from Commerce to Ausimont of 2/23/98, Sec. A, 3-4 (PDoc 18, Fiche 8, Frs. 40, 43-44; CDoc 4, Fiche 19, Frs. 57, 60-61). See Def's ConfApp 2, Sec. A, 3-4. On March 16, 1998, Ausimont responded, in particular noting that the "appropriate home market reactor bead code is provided with each individual further-manufactured sales transaction in Ausimont's U.S. sales listing." Letter with Supplemental Questionnaire Response from Ausimont to Commerce of 3/16/98 ("QR 2") at "SQR-9" and "SQR-10" (PDoc 21, Fiche 9, Frs. 1, 20-21; CDoc 5, Fiche 20, Frs. 1, 20-21). See Def's ConfApp 3 at "SQR-9" and "SQR-10."

Commerce verified Ausimont's responses at the Bollate offices (Milano, Italy) over April 6-10, 1998. See Verification Memorandum of 5/4/98 (PDoc 28, Fiche 11, Fr. 14; CDoc 10, Fiche 22, Fr. 47); Def's ConfApp 5. The verification report notes correction of "a minor error in reporting the calculation of the packing costs for wet reactor bead for certain home market and U.S. sales" which had been submitted by Ausimont officials and describes discussion of wet reactor bead sales in general and a "pre-selected" sale of wet reactor bead in particular. *Id.* (PDoc 28, Fiche 11, Frs. 16, 23-24; CDoc 10, Fiche 22, Frs. 47, 56-57); Def's ConfApp 5 at 4, 8-9.

The preliminary analysis for the POR noted

three sales transactions in the home market of wet reactor bead, comprising approximately 2.10 percent of the total quantity sold and 1.73 percent of the total value sold of the foreign like products. \* \* \* [T]otal sales of further manufactured wet reactor bead in the U.S. market comprise more than [ ] percent (by volume and value) of all subject merchandise sales in the U.S. market.

The size of the margin in these preliminary results is due, to a large extent, to the fact that the U.S. sales of further manufactured wet reactor bead have relatively a high cost of further manufacturing (*i.e.* on the average is approximately [ ] percent of the sales value), which, when deducted with the other charges and adjustments from the U.S. price, yields a substantially lower value than the foreign unit price of wet reactor bead sales in the home market. Our analysis of the company's sales data for both the U.S. and home markets shows that the average net U.S. unit price [of wet reactor bead] is approximately US\$[ ]/lb., whereas the average wet reactor bead sale [price in the home market] is approximately US\$[ ]/lb. We note that in the previous review, there were no sales in the home market of wet reactor bead, and all U.S. sales of further manufactured wet reactor bead were matched to the constructed value for such sales.

Analysis Memorandum of 5/4/98 (PDoc 29, Fiche 11, Frs. 42-43; CDoc 11, Fiche 22, Frs. 75-76); Def's ConfApp 6 at 1-2.

Commerce published its preliminary results on May 11, 1998, finding that NV exceeded CEP by 40.90 percent. *Granular Polytetrafluoroethylene Resin From Italy*, 63 Fed. Reg. 25826 (May 11, 1998.) Ausimont objected, at this point contending *inter alia* that NV should not have been based on home market wet reactor bead sales since they had not been made in the ordinary course of trade or in the usual commercial quantities, and contending that the CEP profit ratio was faulty because imputed credit expenses and inventory carrying costs were included in the numerator but not in the denominator.

In the *Final Results*, Commerce rejected Ausimont's request to exclude the home market wet reactor bead sales on the ground that the case record was compiled without intimation that these sales had been made outside the ordinary course of trade until Ausimont filed its administrative case brief, and that Ausimont had not met its burden of proof "in light of this record evidence." 63 Fed. Reg. at 49081. Specifically, Commerce stated the general preference under 19 U.S.C. § 1677b(a)(1)(A) is to use home market sales of the foreign like product to determine NV if possible before resorting to constructed value ("CV"), that home market sales made outside the ordinary course of trade are to be excluded per 19 U.S.C. § 1677b(a)(1)(B)(i), and that cases including *Murata Mfg. Co. v. United States*, 17 CIT 259, 820 F. Supp. 603 (1993) place the burden of establishing extraordinary sales upon the claimant. *Id.*

Commerce stated that the relevant home market sales for price-based comparison to merchandise further manufactured after importation into the United States are those of products "identical or similar" to U.S. imports of subject merchandise, and that since U.S. further-manufactured sales involved imported wet reactor bead that was further processed into finished PTFE resin, the home market wet reactor bead sales were deemed relevant for that purpose. *Id.* Commerce then noted that Ausimont provided home market wet reactor bead sales in its initial

home market sales listing without claiming inclusion or analysis thereof was inappropriate, that the supplemental questionnaire sent to Ausimont indicated the intent to use the reported home market wet reactor bead sales in the analysis, and that Ausimont's supplemental response, as with its initial response,

made no claim that such home market sales were inappropriate for use in our analysis for any reason, much less that such sales were inappropriate specifically because they were made outside the ordinary course of trade. In fact, the plain language of Ausimont's response to our supplemental questionnaire clearly indicated the company's expectation that such sales would be used, and were appropriate for use, as price-based matches for U.S. further-processed sales of imported wet reactor bead. Thus, at no time during the information-gathering stage of this review did Ausimont provide any evidence, or make any claim, regarding the exclusion of such sales as outside the ordinary course of trade.

*Id.* Commerce further stated that it had indicated its intent to use home market wet reactor bead sales in its analysis prior to verification, and during verification Ausimont officials discussed in detail home market sales selected by Commerce for examination without raising the issue that such sales were extraordinary. *Id.* Therefore, "in the absence of information indicating that the relevant home market sales were inappropriate for use in our analysis" and finding a statutory preference for price-to-price matches, Commerce maintained that the home market wet reactor bead sales were the most appropriate basis for establishing NV for comparison with U.S. sales of imported wet reactor bead (as further-processed). *Id.* at 49081-49082.

Commerce then considered the merits using the ordinary-course-of-trade analysis of *Canned Pineapple Fruit From Thailand*, 60 Fed. Reg. 29553 (June 5, 1995) (Final Determ. LTFV), *sustained sub nom. Thai Pineapple Public Co. v. United States*, 20 CIT 1312, 946 F. Supp. 11 (1996), *reversed on other grounds*, 187 F.3d 1362 (Fed. Cir. 1999.) Commerce agreed that the volume and frequency of wet reactor bead sales in the home market represented small percentages of total sales but found that the absolute amounts were "not insignificant." *Final Results* at 49082. Considering that the quantities of wet reactor bead sold in the home market were larger on average than granular PTFE resin sales, Commerce maintained that (1) total sales and sales volume are not independently dispositive of whether sales had been made in the ordinary course of trade,<sup>4</sup> (2) there was insufficient information on the record to determine whether the difference was attributable "to circumstances rendering the sales in question extraordinary or unrepresentative of normal sales," (3) the range of wet reactor bead and finished PTFE resin quantities did not indicate that the home market wet reactor bead sale quantities were "so unusual as to render such sales inappropriate for

<sup>4</sup> *Final Results* at 49082, referencing *Certain Welded Carbon Steel Standard Pipes and Tubes from India*, 56 Fed. Reg. 64753 (Dec. 12, 1991) (Final Rev. Results), and *Fresh Atlantic Salmon from Chile*, 63 Fed. Reg. 31411, 31423 (June 9, 1998) (Final Determ. LTFV).

our analysis," and (4) "the fact that home market sales of wet reactor bead were made in quantities higher than average does not support a conclusion that [NV] based on the price of such sales would be unreasonably high." *Id.* at 49082. Based on these reasons and its reading of *Nachi-Fujikoshi Corp. v. United States*, 16 CIT 606, 608-609, 798 F. Supp. 716, 718-719 (1992), Commerce also rejected Ausimont's contention that the home market wet reactor bead sales were not "usual commercial quantities." *Id.* See 19 U.S.C. § 1677b(a)(1)(B).

Commerce then rejected Ausimont's comparison of the average selling price of wet reactor bead versus that of finished PTFE resin because "wet reactor bead is sold as an intermediate product, at prices we would expect to differ from those of finished PTFE resin." Similarly, Commerce rejected the comparison of profits because sales of "certain models" of granular PTFE resin showed higher profits than the home market wet reactor bead sales and also because high profits are not necessarily indicative of extraordinary sales. *Final Results* at 49082 (citation omitted).

Commerce also rejected the argument that there was no "market" for wet reactor bead in Italy because the contention "focus[ed] entirely on the immediately prior review, without addressing the fact that the respondent ha[d] in fact sold wet reactor bead in the home market in previous segments of this proceeding." *Id.*, referencing Ausimont's Questionnaire Response of 2/13/95. Considering the differences in terms of sale, Commerce agreed with Ausimont that selected exhibits collected during verification showed that the terms of sale, for the wet reactor bead sales examined, differed from those of certain sales of finished PTFE resin but it stated that it had not examined or collected these exhibits for that purpose and that Ausimont officials had not discussed such differences at verification. Consequently, Commerce stated that it was "unable to conclude from these documents that the terms of sale involving wet reactor bead generally differed significantly from those of other sales of finished PTFE resin products or that different terms of sale are not generally applicable to all sales." *Id.* Lastly, Commerce found it significant that the home market sales of PTFE wet reactor bead were made to the same customer who also purchased finished PTFE resin products. *Id.* For these reasons, Commerce found that Ausimont "failed to explain the facts that establish the extraordinary circumstances rendering the claimed sales outside the ordinary course of trade" and that "the circumstances that would render home market sales of wet reactor bead outside the ordinary course of trade are not present in this review." *Id.* at 49082-49083.

In addition, the *Final Results* rejected Ausimont's claim that the preliminary results relied upon an incorrectly calculated CEP profit ratio. Commerce considered that the claim involved two aspects: whether to include imputed expenses in the total expenses used to calculate the ratio, and whether to include imputed expenses in the pool of U.S. selling expenses to which Commerce applies the ratio. *Id.* The *Final Results*

state that Commerce followed "established" administrative practice to calculate the profit rate in accordance with the normal accounting practice which permits deduction of actual booked expenses but not imputed expenses and then apply this rate to U.S. selling expenses which include imputed expenses consistent with 19 U.S.C. §§ 1677a(d) and 1677a(f). *Id.* at 49083-49084 (citation omitted.) The published margin of dumping was 45.72 percent for covered entries. *Id.* at 49084. Ausimont summonsed the government on October 14, 1998, complaining of this treatment of home market wet reactor bead sales and CEP profit (as well as improper rejection of a level-of-trade adjustment, a claim which has since been dropped.)

#### STANDARD OF REVIEW

Jurisdiction is conferred by 28 U.S.C. § 1581(c). The question for the Court is whether the administrative determination is "unsupported by substantial evidence on the record or is otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). This standard is considered "less deferential" than the arbitrary-and-capricious standard and allows "considerably more generous judicial review." See *American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 412-13 n.7 (1983); *Abbott Labs v. Gardner*, 387 U.S. 136, 143 (1967). See also *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000). The position is whether a reasonable fact finder could have arrived at the agency's decision in light of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938). See also *AK Steel Corp. v. United States*, 192 F.3d 1367, 1371 (Fed. Cir. 1999). This requires examination of the record as a whole, taking into account evidence that both justifies and detracts from an agency's decision, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951), but "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

#### DISCUSSION

##### I

Ausimont's primary claim is that Commerce erred in considering three home market wet reactor bead sales as made within the ordinary course of trade (the "contested sales".)

##### A

As a preliminary matter, the government and DuPont argue it is inappropriate to address the merits because Ausimont first raised its claim after the preliminary review results were published. They contend that the argument is belated, akin to a failure to exhaust administrative remedies. Def's Resp. at 25-30, referencing *United States v. L.A. Tucker Lines, Inc.*, 344 U.S. 33, 37 (1952), *Finnigan Corp. v. International Trade Comm'n*, 180 F.3d 1354, 1362-1363 (Fed Cir. 1999), and *Sandvik*

*Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998). The government points to the detail of regulations for antidumping duty administrative reviews, pursuant to which information must be submitted, verified (as necessary), preliminarily mustered, and briefed with "all arguments that *continue* in the submitter's view to be relevant to the Secretary's final determination or final results." *Id.*, quoting 19 C.F.R. § 351.309(c)(2) (government's emphasis.) See 19 C.F.R. §§ 351.301(b)(2), 351.307, 351.221(b)(4) (1997). In addition, the government asserts Commerce's consideration was "hampered" by an inability to develop a fuller factual record on the issue since it did not have sufficient time to consider and verify the claim. It argues, furthermore, that Ausimont's "affirmative statements" on the contested sales amounted to "waiv[ing] \* \* \* any claim it might have had that wet reactor bead sales were outside the ordinary course of trade" under the logic of *Finnigan*, *supra*. Def's Resp. at 27-30, referencing in addition *Murata Mfg. Co.*, *supra*, 17 CIT at 265, 820 F. Supp. at 607, *Fujitsu General Ltd. v. United States*, 19 CIT 359, 374, 883 F. Supp. 728, 739, *aff'd* 88 F.3d 1034 (Fed. Cir. 1996), and *Mukand, Ltd. v. United States*, Slip Op. 99-35, 1999 WL 342461 (Apr. 9, 1999).

Be that as it may,<sup>5</sup> if the argument here is one of exhaustion, that doctrine forecloses judicial review of issues not first presented to the agency for consideration but does not proscribe review where an issue was actually considered. *United States v. L.A. Tucker Truck Lines, Inc.*, *supra*; *Rhone Poulenc, Inc. v. United States*, 13 CIT 239, 710 F. Supp. 348 (1989), *aff'd* 899 F.2d 1185 (1990). If the argument is one of timeliness, Ausimont's raised its points not two weeks but more than three months prior to issuance of the *Final Results*, and there was apparently sufficient time to consider data pertaining to not only the instant POR but prior reviews as well. Cf. 19 U.S.C. § 1677m(e) (1994). For that matter, the mere provision of comparison market sales data at the fact-gathering stage in response to agency request does not, as a consequence, render such sales ordinary. Cf. *NTN Bearing Corp. of America v. United States*, 19 CIT 1221, 1229, 905 F. Supp. 1083, 1090-91 (1995). A claimant must prove the circumstances which render sales extraordinary, e.g. *Koyo Seiko Co., Ltd. v. United States*, 20 CIT 772, 783-84, 932 F. Supp. 1488, 1497-98, (1996); *Nachi-Fujikoshi Corp.*, *supra*, 16 CIT at 608-609, 798 F. Supp. at 718-719, and executing *volte face* certainly would not alleviate the burden of persuasion, however there is no presumption that sales are ordinary, see *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27299 (May 19, 1997) (Final Rule), and facts might speak for themselves. Further imperatives followed Ausi-

<sup>5</sup> *Finnigan* found appellate-level argument favoring a particular construction of a patent claim had not been "specifically" asserted to the International Trade Commission and was therefore waived in the wake of an administrative law judge's determination. *Mukand* sustained Commerce's disregard of untimely "statements of fact in support of allegations". *Fujitsu* justified rejecting a level-of-trade-adjustment claim not only because it was untimely raised, two weeks prior to a hearing thereon, but also because the questionnaire had specifically requested a statement of such claim (if any) and provision of supporting documentation therefor. The respondent had provided neither. See *Television Receivers, Monochrome and Color, From Japan*, 56 Fed. Reg. 5392, 5392 at Comment 17 (Feb. 11, 1991) (Final Rev. Results).

mont's first questionnaire response<sup>6</sup>, but in the end Commerce had a duty, as implied in the matching instructions sent to Ausimont with the first questionnaire, to "consider only those sales in the comparison market that are \* \* \* made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product." Letter with Questionnaire from Commerce to Ausimont of 9/24/97 app. I at 10 (PDoc 3, Fiche 4, Fr. 19). See Def's PubApp 3, app. I at 10. Otherwise, authority to exclude sales on Commerce's own initiative is lacking.

## B

For the POR, U.S. sales of granular PTFE resin comprised | | percent by volume, | | percent by value, and | | percent by number of transactions (| | sales out of | | total sales of subject merchandise and foreign like product), whereas the contested sales comprised 2.0 percent of home market sales by volume, 1.7 percent by value, and 0.4 percent by number of transactions. The contested sales were sold to one of Ausimont's customers, all of whom were "fabricators" at the time, on a "pending" order basis which gave Ausimont discretion to cancel if an order could not be filled by a specified target date. By contrast, there were | | home-market sales of granular PTFE resin purchased by | | customers with quantities and prices subject to change until shipment or, occasionally, on an "open order" basis as to quantity and price terms, meaning that the customer intends to order a particular product in the future.<sup>7</sup> The contested sales averaged over five times the quantity, 21.3 percent lower prices, and nearly two times higher profits, than average sales of granular PTFE resin, and accounted for more than 72 percent of the margin of dumping, according to Ausimont.

### 1. The Plaintiffs' Arguments.

Ausimont contends Commerce did not properly consider the "totality of the circumstances" of the contested sales on volume, frequency, prices, quantities, profits, market, terms and conditions, and customers, and in light of *Thai Pineapple Public Co. v. United States*, 20 CIT 1312, 946 F. Supp. 11 (1996).<sup>8</sup> Pls' Br. at 12-14, 33, referencing Pls' ConfApps 2, 5, 6. Specifically, it argues Commerce should have (1) con-

<sup>6</sup> *Inter alia*, Ausimont was directed to "make the following revisions to the U.S. and comparison market sales databases", which included instruction to "Confirm," "Include," "Assume," "continue to report" *et cetera*, and also "Please note that the [foregoing] data is also required in the U.S. and comparison market sales listings for wet reactor head products in both markets. Ensure that you have provided home market sales of all products that can be matched to reactor head that is further manufactured in the United States \* \* \*." Letter with Supplemental Questionnaire from Commerce to Ausimont of 2/23/98 (PDoc 18, Fiche 8, Frs. 43-44; CDoc 4, Fiche 19, Frs. 59-60) (highlighting added). See Def's ConfApp 2 (Section A, pp. 2-3).

<sup>7</sup> QR 1 at A-10-11 (PDoc 13, Fiche 5, Frs. 20-21; CDoc 1, Fiche 13, Frs. 20-21).

<sup>8</sup> In *Thai Pineapple Public Co. v. United States*, 20 CIT 1312, 946 F. Supp. 11 (1996), *rev'd on other grounds*, 187 F.3d 1362 (Fed. Cir. 1999), a single sale comprising 0.01 percent by volume of the respondent's foreign market database was compared to two United States sales amounting to one percent by volume of the U.S. sales database. The comparison accounted for 90 percent of the preliminary dumping margin. Commerce considering the record for volume, frequency, quantity, price, profits, market demand, number and type of customers, and terms of sale, and concluded that except for type of customer and terms of sale the facts supported exclusion. See 20 CIT at 1315-1316, 946 F. Supp. at 16. Ausimont points out that Commerce has also recognized that overrun sale analysis (e.g., volume, price, profit, physical differences, end-uses, number of customers,) is useful in evaluating non-overrun sales. Pls' Supp. Mem. at 8. See *Laclede Steel Co. v. United States*, 19 CIT 1076 (1995); *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 64 Fed. Reg. 12927, 12941 (Mar. 16, 1999) (Final Rev. Results).

sidered wet reactor bead distinct from granular PTFE resin, since both are types of PTFE and wet reactor bead is not a model of granular PTFE resin, (2) accorded heavier weight to volume and frequency, (3) compared quantities, profits and prices based on aggregate averages, and (4) considered in a fuller light the "market" for wet reactor bead in Italy and the contested sales' different terms of trade and usage as compared with granular PTFE resin.

Ausimont argues that the ordinary-course-of-trade statute, 19 U.S.C. § 1677(15), requires Commerce to examine "the conditions and practices which \* \* \* have been normal in the trade under consideration with respect to merchandise of the same class or kind" and it argues the proper comparison here is between two types of PTFE—wet reactor bead and granular PTFE resin—and not between wet reactor bead and certain "models" of granular PTFE resin.<sup>9</sup> Pls' Supp. Mem. at 4, referencing *Certain Welded Carbon Steel Standard Pipes and Tubes from India*, 56 Fed. Reg. 64753 (Dec. 12, 1991) (Final Rev. Results) ("Pipes From India").<sup>10</sup> *Accord Mantex Inc. v. United States*, 17 CIT 1385, 1404, 841 F. Supp. 1290, 1306 (1993). It states Commerce has distinguished clinker and cement as separate foreign like products, see *Calcium Aluminate Cement, Cement Clinker and Flux From France*, 59 Fed. Reg. 14136, 14141 (Mar. 25, 1994) (Final Determin. LTFV), and it argues that wet reactor bead is to granular PTFE resin as clinker is to cement. Pls' Supp. Mem. at 5-9.

On its second point, Ausimont argues volume and frequency are necessary precursors to "heightened scrutiny" of other ordinary-course-of-trade factors and therefore are, or should be, accorded "great weight" in the analysis. Pls' Br. at 12-14 referencing *CEMEX S.A. v. United States*, 19 CIT 587, 589-93 (1995), *aff'd after remand results sustained* 133 F.3d 897, 903 (Fed. Cir. 1998) and *Mantex Inc. v. United States*, *supra*, 17 CIT at 1404, 841 F. Supp. at 1306 (1993).<sup>11</sup> Out of [ ] kilograms of foreign like product sold in Italy, the absolute amount of the contested sales was [ ] kilograms. Ausimont argues that even this overstates because wet reactor bead was sold in 700-kilogram "bags" containing 30 percent water, useless "initiator residues," and organic contaminants, whereas granular PTFE resin is packed dry and sold in drums weighing at most 45 kilograms. Pls' Br. at 14. *Cf.* note 26, *infra*. The volume and frequency of the

<sup>9</sup> The antidumping duty order originally circumscribed only "granular PTFE resin." See *Granular Polytetrafluoroethylene Resin From Italy*, 53 Fed. Reg. 26096 (July 11, 1988) (Final Determin. LTFV). All models thereof were determined to constitute a single class or kind of merchandise.

<sup>10</sup> *Pipes From India* covered "shipments of welded carbon steel pipes and tubes with an outside diameter of 0.375 inch or more but not over 16 inches." 56 Fed. Reg. at 64753. The issue was whether sales in India of pipe meeting American Society for Testing Materials specification A-120 ("ASTM pipe") were within the ordinary course of trade. After comparing differences between ASTM pipe and Indian Standard IS-1239 pipe based on (1) volume, (2) number of buyers, (3) standards and product use, (4) price, (5) profit, and (6) production runs (*i.e.* overruns or seconds), Commerce determined the ASTM pipe sales to have been outside the ordinary course of trade. Commerce also applied difference-in-merchandise adjustments to the several "such or similar" categories of IS pipe in accordance with 19 U.S.C. § 1677b(a)(4)(C). See *Certain Welded Carbon Steel Standard Pipes From India*, 56 Fed. Reg. 26650, 26651 (June 10, 1991) (Preliminary Results).

<sup>11</sup> *CEMEX S.A. v. United States*, 19 CIT 587, (1995), *aff'd after remand results sustained* 133 F.3d 897 (Fed. Cir. 1998) sustained the determination that home market sales of certain types of cement were extraordinary based on analysis of (1) volume, (2) sales patterns, (3) home market demand, (4) shipping arrangements and allocation of shipping costs, (5) profitability, and (6) corporate image, *i.e.* the "promotional quality" of the sales. *Mantex sustained Pipes From India*.

contested sales were determined small, but "not insignificant" because "the quantities involved in these sales are in fact larger on average than for other sales." *Final Results* at 49082. Ausimont argues that this was arbitrary since it offers no indication of what standard was applied, and for that matter whatever standard was used was not applied consistently since Commerce on its own initiative and without explanation determined seven home market sales of a model of granular PTFE resin were outside the ordinary course of trade although the absolute quantity of these sales, sold to three customers in Italy, was [ ] kilograms.<sup>12</sup> The only agency determination to reject an ordinary course of trade claim based on the "significance" of an absolute volume amount, according to Ausimont, was *Fresh Atlantic Salmon From Chile*, 63 Fed. Reg. 31411, 31423 (June 9, 1998) (Final Determin. LTFV) ("*Fresh Atlantic Salmon*"), which also determined those sales to have been "regularly sold throughout" the period of investigation.<sup>13</sup> Ausimont states it may therefore be inferred that their frequency was "not small," in contrast to the determination on that issue here, and it notes that neither the government nor DuPont pointed to a proceeding in which an ordinary course of trade claim was rejected in the presence of both small volume and small frequency. Ausimont states that Commerce has considered small volume and frequency arguably dispositive in their own right for determining sales extraordinary,<sup>14</sup> and while Ausimont concedes that other considerations may outweigh the presence of infrequent and low-volume sales, it maintains that none were present in the *Final Results*.

On its third point, Ausimont argues that the government's rejection of its contention as "incomplete explanation" amounts to mere rationalization because *Thai Pineapple Public Co.* and the underlying determination looked only to variable differentiation. Pls' Br. at 15; Pls' Rep. at 15, 18. Ausimont argues Commerce offered insufficient or conflicting explanations to ignore or reject comparisons of the contested sales to granular PTFE resin sales based on quantity, price, and profit. It argues that the plain meaning of "normal" in the context of "merchandise of the same class or kind" in 19 U.S.C. § 1677(15) is "average" or "typical," and it points out that Commerce has typically examined ordinary-course-of-trade-claims by reference, *inter alia*, to average aggregate

<sup>12</sup> Pls' Rep. at 20. See line 116 of Commerce's Final AD Administrative Review computer program log which reads "IF TYPEH=, OR FILLERH=, OR FILLPCTH=, OR GRADEH=, THEN OUTPUT OFFSPECH:". This apparently served to output seven sales of product code [ ] as outside the ordinary course of trade. None of the parties address the reason why. Total volume and frequency of product code [ ] were greater than the contested sales, i.e. 3.0% and 0.9% of total merchandise sold (excluding contested sales). The average quantity of product code [ ] was 64% of the average quantity of the contested sales.

<sup>13</sup> See *Fresh Atlantic Salmon*, *supra*, 63 Fed. Reg. at 31423 ("While sales of vacuum-packed fillets may represent a small percentage of total sales, the absolute amount of these sales [i.e. several thousand kilograms] is not insignificant".)

<sup>14</sup> Following briefing, Ausimont submitted reference to *Gray Portland Cement and Clinker from Mexico*, 65 Fed. Reg. 13943 (Mar. 15, 2000) (Final Rev. Results) as Commerce's recent treatment of the matter, along with a motion to submit. The government and DuPont argued against such submission and in addition addressed its substantive impact. Commerce therein opined that examination of the volume and frequency of cement produced as Type V LA alone indicated that home market sales had been "unusual." See Decision Memorandum, A-201-802, ARP 97-98 (Mar. 15, 2000), available at <http://ia.ita.doc.gov/frn/summary/2000mar.htm>. The parties' assistance on agency treatment of frequency and volume is helpful, and the motion to submit is therefore granted.

quantifiable variables.<sup>15</sup> Ausimont therefore argues that only proof of quantities "significantly higher,"<sup>16</sup> prices "significantly lower,"<sup>17</sup> and profits "much higher,"<sup>18</sup> than those of the "vast majority" of granular PTFE resin sales, is all that should have been required to show that the contested sales were not made in the ordinary course of trade.

Ausimont further argues that the determinations in the *Final Results* on volume and quantity are inherently contradictory: the determination that the volume of the contested sales was "not insignificant" rests on the determination that their quantities were "larger on average than for other sales," yet quantities were determined not "so unusual as to render such sales inappropriate for our analysis" because of the range of "individual sales of both wet reactor bead and finished PTFE resin." See *Final Results* at 49082. Ausimont argues "Commerce cannot have it both ways:" if the absolute amount of the reactor bead sold is significant, then so is the fact that the average quantity of the contested sales is five times higher than that of granular PTFE resin sales, but if it is not significant that the average quantity of the contested sales is five times higher, then neither are their absolute amounts. Pls' Supp. Mem. at 17. Ausimont further argues that the reason given for rejecting the comparison of average prices in Italy for wet reactor bead and granular PTFE resin created an "impossible hurdle,"<sup>19</sup> i.e., there were no "normal" home market sales of wet reactor bead with which the prices of the contested sales could be compared, and was implicitly at odds with the de-

<sup>15</sup> See Pls' Br. at 12, 27-29 referencing CEMEX, *supra*; *Montex*, *supra*. See also Pls' Supp. Mem. at 11-15, referencing *Laclede Steel Co. v. United States*, 18 CIT 965, 968 (1994) on remand, *supra*, 19 CIT at 1080 (1995); *Gray Portland Cement and Cement Clinker From Mexico*, 64 Fed. Reg. 13148, 13156 (Mar. 17, 1999) (Final Rev. Results) (see Aug. 31, 1998 Memoranda at 4); *Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand*, 61 Fed. Reg. 1328 (Jan. 19, 1996) (Final Rev. Results); *Canned Pineapple Fruit From Thailand*, *supra*, 60 Fed. Reg. 29553; *Granular Polytetrafluoroethylene Resin From Japan*, 58 Fed. Reg. 50343, 50345 (Sep. 27, 1993) (Final Rev. Results); *Sulfur Dyes, Including Sulfur Vat Dyes, From The United Kingdom*, 58 Fed. Reg. 3253, 3256 (Jan. 8, 1993) (Final Determ. LTVF); *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea*, 57 Fed. Reg. 42942, 42948 (Sep. 17, 1992) (Final Determ. LTVF). Ausimont asserts that Commerce previously gave notice of a preference for aggregate data for determining CV. Pls' Supp. Mem. at 15, referencing *Antidumping Duties: Countervailing Duties*, *supra*, 62 Fed. Reg. at 27359.

The use of aggregate data results in a reasonable and practical measure of profit that the Department can apply consistently in each case. By contrast, a method based on varied groupings of foreign like products, each defined by a minimum set of matching criteria shaped with a particular model of the subject merchandise, would add an additional layer of complexity without generating more accurate results.

<sup>16</sup> The contested sales weighed 1 | (including the useless fluid and initiator residues) and averaged five times the average weight of granular PTFE resin sales. 13 sales of merchandise, about 1.8%, were in greater quantities than the average quantity of the contested sales, three of those were in greater quantities than two of the contested sales, and 46 sales, about 6.3%, were in greater quantities than the smallest contested sale, which would have been larger but for Ausimont's cancellation of part of the order. See Pls' Br. at 37.

<sup>17</sup> The average gross unit price of the contested sales was 21.3% lower than average home market PTFE granular resin sales. See *id.* at 30. Ausimont points out that during the POR there were only six other sales of the foreign like product in the home market with lower selling prices than the average gross unit price of the contested sales, and of those sales, Commerce, on its own initiative, excluded five as "off-spec product" and outside the ordinary course of trade, leaving only one with higher pricing than any sale of wet reactor bead. *Id.* at 31, referencing Pls' ConApp 7; Pls' Rep. at 44-45. Eliminating these sales, Ausimont asserts that the average "normal" gross unit price on granular PTFE resin was 37% greater than the average gross unit price of the contested sales.

<sup>18</sup> Ausimont argues that Commerce's observation that 1 | "models" of PTFE granular resin had higher gross profit margins than those of the contested sales misses the point, since those model sales comprised only 1 | % of total sales volume whereas 1 | % had lower gross profit margins. Ausimont contends that profits were "abnormally" high by either a gross or net profit comparison: gross profit on the contested sales as a percentage of the total cost of production was over 1 | % but was under 1 | % for home market sales of PTFE granular resin; regarding net profit, the difference was 1 | % versus 1 | %. Pls' Br. at 26-27, referencing Pls' ConApp 4 at 6 and Pls' ConApp B. On a net profit basis, Ausimont contends only 1 | models of PTFE granular resin had "slightly higher" profit percentages than the contested sales, and those models comprised only 1 | % of the total sales of the merchandise by volume. *Id.* at 29. See Pls' ConApp B.

<sup>19</sup> Pls' Br. at 32, referencing *NEC Home Electronics Ltd. v. United States*, 22 CIT 167, 3 F. Supp. 2d 1451 (1998) (requiring proof of sales when there were no such sales was unreasonable and abuse of discretion) and *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1573 (Fed. Cir. 1990) (rejecting use of best information available in situation "where submitter cannot produce data because no such data ever existed").

termination in the circumvention proceeding that the value added in the U.S. by further processing of wet reactor bead into granular PTFE resin is "small." Furthermore, Ausimont argues that to suggest that differences in prices and quantities are attributable solely to the fact that wet reactor bead is an intermediate product is to presume that it should be sold in higher quantities and at lower prices than those of the further-manufactured product. Ausimont argues quantities five times higher and prices 21.3 percent lower cannot be attributed solely to this "determination," because if the argument was true, it would only exacerbate the disparity in profits,<sup>20</sup> since it would likewise have to presume profit equality. Pls' Supp. Rep at 10-11. Ausimont points out that since the argument presumes a higher *per sale* quantity of wet reactor bead, it cannot be said that the "absolute" amount of wet reactor bead sold was therefore a fact of significance in the determination on volume and frequency. In the event, Ausimont contends, the determinations on price, quantity, frequency, and volume would become irrelevant, neither for its position nor held against it for lack of proof. Pls' Supp. Mem. at 10-11, referencing *Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand*, *supra*, 61 Fed. Reg. at 1331 ("not a requirement that different price and profit levels be demonstrated in order for sales to be determined outside the ordinary course of trade.")

Commerce concluded there was a "market" in Italy for wet reactor bead "because Ausimont has in fact made sales in prior segments of this proceeding." Ausimont contends this is incorrect for several reasons. First, wet reactor bead is not listed as a product offered for sale on any of Ausimont's sales literature. Second, it is not "normally" sold to anyone other than Ausimont USA. Third, the contested sales were purchased by only one of [ ] customers, all of whom were previously verified as being "fabricators" who further processed granular PTFE resin into molded shapes and mechanical parts,<sup>21</sup> *i.e.*, not in the business of making granular PTFE resin from wet raw polymer. Fourth, the uses of wet reactor bead are "extremely limited," since unlike granular PTFE resin it cannot be directly compression molded into marketable shapes or forms.<sup>22</sup> Fifth, sales cannot be "representative" of the home market if there is no "market," and evidence of insignificant demand ought to be significant in the determination of that issue. *Id.* at 16-17, citing *Thai Pineapple Public Co.*, 20 CIT at 1314, 946 F. Supp. at 15; *Mantex*, 17 CIT at 1405, 841 F. Supp. at 1307. Ausimont contends that the *Final Results* stand in "stark contrast" to the circumvention investigation (in which Commerce determined two sales of wet reactor bead in Italy constituted

<sup>20</sup> "[A] profit level comparison is probative of the economic reality" of whether sales were within or without the ordinary course of trade. *Mantex*, *supra*, 17 CIT at 1406, 841 F. Supp. at 1308. Therefore "the disparity in profit margins is indicative of sales that were not in the ordinary course of trade." *CEMEX*, *supra*, 133 F.3d at 901.

<sup>21</sup> See Pls' Supp. Mem at 8, citing *Circumvention Determination*, *supra*, 58 Fed. Reg. 26100.

<sup>22</sup> Ausimont argues *Mantex's* treatment of usage is instructive: Indian Standard ("IS") pipe sold in large numbers in India and in small numbers in the United States, whereas pipe manufactured according to the American Society for Testing and Materials ("ASTM") standards sold in small numbers in the India and in greater numbers in the United States. ASTM pipe was unusual in the Indian market, therefore its uses in India were limited, therefore *a fortiori* demand in India would have been marginal. 17 CIT at 1405, 841 F. Supp. at 1307.

"virtually no market")<sup>23</sup> and the reality of this POR, for which Commerce verified that there had been no home market sales during the 1995-1996 period. Pls' Br. at 18; Pls' Supp. Mem. at 9-10. Ausimont also emphasizes that Commerce agreed the volume and frequency of the contested sales were small in comparison with total sales of merchandise and that even where demand has been shown to exist sales have been excluded when the market was "so" small and the volume of sales "very" low.<sup>24</sup>

Regarding the terms and conditions of sale, the *Final Results* concluded that the verification documents did not indicate that the terms and conditions for the contested sales "generally differed significantly" from sales of granular PTFE resin "or that different terms [and conditions] of sale are not generally applicable to all sales." *Final Results*, 63 Fed. Reg. at 49082. Ausimont points out that wet reactor bead was neither described in any of the product brochures<sup>25</sup> nor listed or otherwise offered as a product for sale, there were no standard prices for wet reactor bead, and the prices of the contested sales were separately negotiated and reflect the dry weight sold.<sup>26</sup> Furthermore, sales canceled before invoice may be indicative of sales outside the ordinary course of trade, see *Murata Mfg. Co., supra*, 17 CIT at 263, 820 F. Supp. at 606 (1993),<sup>27</sup> and Ausimont contends the documentation corroborates that the contested sales were on a "pending order" basis since at the bottom of the sales confirmation for OBS 81 is typewritten "*Si può spedire OK*" (translated thereon "It can be delivered") and Ausimont also cancelled three of the four orders in OBS 376 before invoice. See Pls' Conf. Br. at 39-40 and attachment C thereto ("Agreed Supplement to the Record"); Pls' Conf. Rep. at 49-51 and attachment. See also Exhibit B-4 to Verifi-

<sup>23</sup> *Circumvention Determination*, 58 Fed. Reg. at 26110. See Pls' Br. at 19. Ausimont also moves to supplement the administrative record, contending that Commerce relied on evidence from such prior proceedings to justify its conclusions but without considering the totality of that evidence which shows that there had been no market for wet reactor bead in the periods preceding the instant POR. Pls' Br. at 22, citing *F. Lli De Cecco Di Filippo Fara San Martino v. United States*, 21 CIT 1124, 1126-27, 980 F. Supp. 485, 487 (1997) (information was part of an agency record if it "was in front of [Commerce] during the investigation, regardless of whether or not [Commerce] chose to ignore it"); *Floral Trade Council of Davis, California v. United States*, 13 CIT 242, 243, 709 F. Supp. 229, 230 (1989) ("those documents at the agency which become sufficiently intertwined with the relevant inquiry are part of the record"). Ausimont contends that, in making its findings for the *Final Results*, Commerce ignored the fact that over the course of five consecutive years, since 1993 there had been only five sales of wet reactor bead to unaffiliated customers: two in the 1993-1994 period (the review in which Commerce determined that there was "virtually no market for wet reactor bead" and used CV therefor), and the three in this 1996-1997 POR. *Id.* at 23-24, referencing Pls' ConfApp A-1 and A-2. Ausimont argues Commerce also ignored Ausimont's report for that review on the average profit on home market sales of the class or kind of merchandise, which Commerce had requested and to which Ausimont had responded: "sales of [wet] reactor bead on the open market are not significant and do not reflect current market conditions" and that those "sales \* \* \* were less than 1% of the total production," which Commerce accepted. *Id.* referencing Pls' ConfApp A-2. Ausimont argues Commerce here also ignored a printout for the 1994-1995 review period from the amended final determination disclosure materials listing the weighted-average home market values of all "models" of foreign like product showing no sales of wet reactor bead during that period. See Pls' ConfApp A-2. The Court has considered the government's and DuPont's opposition, and concludes that the *Final Results* opened the door to this inquiry and that therefore allowing Ausimont's motion would be proper and in accordance with 19 U.S.C. § 1516a(b)(2)(A)(i). *Floral Trade Council and FLII De Cecco Di Filippo Fara San Martino*. Since this is a "segment" of a "proceeding," it is arguable that the information is part of "the record" in any event.

<sup>24</sup> See, e.g., *Gray Portland Cement and Clinker From Mexico*, *supra*, 64 Fed. Reg. at 13157.

<sup>25</sup> See QR 1 at A-13 (PD 13, Fiche 5, Frs. 20-21; CDoc 1, Fiche 13, Frs. 20-21).

<sup>26</sup> See *id.* at A-6 (PD 13, Fiche 5, Fr. 16; CD 1, Fiche 13, Fr. 16). See also Exhibit B-4 to Verification Memorandum dated 5/4/98, OBS 376 (CDoc Ex. B-4, Fiche 32, Frs. 5, 91) (indicating different weights for shipping and invoicing purposes.)

<sup>27</sup> See also *NSK Ltd. v. United States*, 190 F.3d 1321 (Fed. Cir. 1999) (different process of ordering or shipping are relevant to ordinary-course-of-trade inquiry.)

cation Memorandum dated 5/4/98, OBS 81 (CDoc Ex. B-4, Fiche 32, Fr. 12). Ausimont contends that the documentation of separately negotiated prices, orders canceled before invoicing, and the characterization and processing of orders as "pending" therefore show that the contested sales differed significantly from those of granular PTFE resin sales and were therefore unusual.

Alternatively, Ausimont contends the contested sales should be excluded from NV as not sold in the "usual commercial quantities"<sup>28</sup> because their average quantity was [ ] kilograms whereas the mean average quantity of other merchandise sold during the POI was [ ] kilograms. Pls' Br. at 41, referencing *Nachi-Fujikoshi Corp.*, *supra*, 16 CIT 606, 798 F. Supp. 716.

## 2. The Defendant's and Defendant-Intervenor's Arguments.

The government responds that: (1) after passage of the Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994) ("URAA"), Commerce retained discretion to determine whether a sale is within or without the ordinary course of trade,<sup>29</sup> (2) wet reactor bead is properly subject to the antidumping order against granular PTFE resin, (3) Commerce was "well aware" of the differences between wet reactor bead and granular resin, and (4) Ausimont provided data on home market sales of wet reactor bead in response to Commerce's specific request to provide the home market products and sales believed to be the "most appropriate" for comparison with imported wet reactor bead. Therefore, the government states, Commerce determined that the contested sales were an appropriate foreign like product for constructing export price sales of wet reactor bead. Def's Resp. at 20-25, 33-34; Def's Supp. Mem. at 9; DuPont's Resp. at 7-8. *See* QR 1 at Ex. B-2 (PDoc 13, Fiche 5, Fr. 94; CDoc 1, Fiche 15, Fr. 52); Letter enclosing updated U.S. and home market databases from Ausimont to Commerce of 12/19/97 at Ex. 1 (CDoc 3; Fiche 19, Fr. 38); Verification Memorandum dated 5/4/98 at Ex. A-3-1 (CDoc Ex. A-3-1; Fiche 26, Fr. 49). *See also* DuPont's ConApps 4, 5, 6.

As a general matter, the government maintains that there was no departure from agency practice in examination of the conditions and practices of the contested sales, that even if there were, Commerce is relieved of explaining any departure by virtue of *Allied-Signal Aerospace Co. v. United States*, 28 F.3d 1188 (Fed. Cir. 1994),<sup>30</sup> and that Ausimont only recited differences between the contested sales and PTFE granular resin sales but did not provide a "complete explanation of the facts which

<sup>28</sup> 19 U.S.C. § 1677(17) (1994) defines "usual commercial quantities" for "any case in which the subject merchandise is sold in the market under consideration at different prices for different quantities" to mean "the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity."

<sup>29</sup> Def's Resp. at 25, stating *accord Mitsubishi Heavy Industries, Inc. v. United States*, 22 CIT 541, 568, 15 F. Supp.2d 807, 830 (1998).

<sup>30</sup> Def's Resp. at 31. The appellate court in *Allied-Signal* viewed the "nature" of "best information available" determinations as "discretionary, case-by-case" and concluded "Commerce is obligated only to use a methodology consistent with its statutory authority, and it is not required to supply a 'reasoned analysis' justifying its adoption." 28 F.3d at 1191.

establish the extraordinary circumstances rendering particular sales outside the ordinary course of trade." Def's Resp. at 31-32, quoting *NTN Bearing Corp. of America, supra*, 19 CIT at 1229, 905 F. Supp. at 1090-91. DuPont adds that Ausimont has not met the "heavy" burden of proof for disregarding sales which was "set forth" in *Koyo Seiko Co., Ltd. v. United States, supra*, 20 CIT at 783-84, 932 F. Supp. at 1497-98 (claim that certain sales consisted of samples or obsolete product insufficiently substantiated by evidence of record,) and it points out that in *Mantex* there was an "explanation" for the aberrational nature of the sales, namely the fact that the ASTM type pipe sold in India was packed for export and unstamped, lending credence to finding that those sales consisted of production overruns or returns on export sales. DuPont's Resp. at 16-17, 33; DuPont's Supp. Resp. at 6-7. Compare *Mantex, supra*, with *Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand, supra*, 61 Fed. Reg. at 1331. See also *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France et al.*, 58 Fed. Reg. 39729 (July 26, 1993) (Final Rev. Results) ("*Antifriction Bearings From France*"),<sup>31</sup>

The government and DuPont argue that neither *CEMEX* nor *Mantex* compels exclusion of low-volume and infrequent sales, that in fact there are "numerous" instances where infrequent and low volume sales were considered ordinary, including *Murata Mfg. Co., supra*, *NTN Bearing Corp. of America, supra*, and *NSK Ltd. v. United States*, 17 CIT 590, 596-97, 825 F. Supp. 315, 321 (1993). The government asserts that there is no authority for the proposition that volume and frequency are to be accorded "great weight" in ordinary-course-of-trade analyses, or that frequency and volume are determinative "in and of themselves" (despite *Gray Portland Cement and Clinker from Mexico, supra*, 65 Fed. Reg. 13943), and that the *Final Results* are in accordance with whatever administrative practice may be gleaned from this area, including *Fresh Atlantic Salmon*. See Def's Resp. at 31-32, 37-38. DuPont contends that the volume of the contested sales was *not* insignificant, compared to "sales of many other PTFE products" and it points out that *Fresh Atlantic Salmon* involved the "much smaller absolute quantity" of only several thousand kilograms. DuPont's Resp. at 18-21. "Without more, Commerce could not conclude, as plaintiff would have liked, that the sizeable absolute amount of the PTFE reactor bead sales was comparable to a lesser amount of granular PTFE resin sales." *Id.* at 19.<sup>32</sup>

The government asserts that Commerce relies on both averaging and examination of ranges in analyzing ordinary course of trade claims, and

<sup>31</sup> In *Antifriction Bearings From France*, Commerce opined:

Although respondent provided price comparison data for all of its sample and prototype sales, this data merely proves that such sales were made in smaller quantities at higher prices. Respondent has provided no information regarding the circumstances surrounding the sales alleged to be outside the ordinary course of trade. Therefore, FAG-Germany's data provides insufficient evidence in and of itself for proving that sample sales were made outside the ordinary course of trade.

58 Fed. Reg. at 39775

<sup>32</sup> Ausimont responds that "several thousand kilograms" of fish fillets "probably is a lot of fish," at the same time maintaining that 1 thousand kilograms of wet reactor bead sold in Italy was insignificant when compared to all granular resin sales. Pls' Rep. at 19.

that a party's preference for comparing aggregate averages does not mean that a determination "based on ranges" is unsupported by substantial evidence.<sup>33</sup> Def's Supp. Mem. at 15, referencing *Eckstrom Indus. Inc. v. United States*, 23 CIT \_\_\_, \_\_\_, 70 F.Supp.2d 1360, 1363-64 (1999) (recently reversed, see \_\_\_ F.3d \_\_\_, 2001 WL 737334 (Fed. Cir. 2001)). Averaging analysis would be "immaterial" here, the government contends, because of *Consolo v. Federal Maritime Comm'n*, supra, 383 U.S. at 620 (possibility of drawing inconsistent conclusions from the same evidence does not necessarily render agency determinations unsupported by substantial evidence.) See Def's Resp. at 33-34.

The government demurs that it would be incorrect to state that Commerce's practice is to analyze ordinary course of trade claims by comparison to merchandise within the same "such or similar"<sup>34</sup> or "foreign like product" categories.<sup>35</sup> DuPont distinguishes *Calcium Aluminate Cement, Cement Clinker and Flux From France*, supra, and the like as merely concerned with comparison of sales for matching purposes in the context of the "hierarchical rules" of 19 U.S.C. § 1677(16) for determining "foreign like product" or "such or similar merchandise" which favor "[t]he subject merchandise and other merchandise which is identical in physical characteristics with, and that was produced in the same country by the same person as, that merchandise," and this it argues is a "different statutory mandate" than 19 U.S.C. § 1677(15). DuPont's Supp. Resp. at 10-11. Continuing, it posits that if Commerce's authority were restricted to type-to-type comparisons, there would be no basis to exclude particular sales within a type or model such as samples and product overruns, adding that while Commerce has exercised discretion to compare the attributes of sales of certain "types" of merchandise against the attributes of sales of other types, in other cases Commerce has chosen to make comparisons on an individual sale- or model-basis or in terms of ranges of sales, and that Commerce's only consistent prac-

<sup>33</sup> See Def's Supp. Mem. at 14-15, referencing *Steel Wire Rod From Canada*, 63 Fed. Reg. 9182, 9186 (Feb. 24, 1998) (Final Determin. LTFV) ("the price of the sale at issue is near the midpoint of the price range of Stelco's home market sales, and there is no evidence that the price was aberrational"); *Coated Groundwood Paper From France*, 56 Fed. Reg. 56380, 56383 (Nov. 4, 1991) (Final Determin. LTFV) ("because the quantities of these sales were within the typical range, and because there is no reason to believe that this was not the normal commercial practice for these sales prior to the POI, we do not believe that these sales fall outside the ordinary course of trade"); *Industrial Phosphoric Acid From Israel*, 52 Fed. Reg. 25440, 25443 (July 7, 1987) (Final Determin. LTFV) ("The sales price falls within the range of prices paid by other customers in the home market and, thus, we have included this sale in our foreign market value calculations."); See also DuPont's Supp. Mem. at 3-4, referencing *inter alia Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.*, 63 Fed. Reg. 33320, 33344 (June 18, 1998) (Final Review Results) ("regarding NTN's abnormally high-profit sales, the presence of profits higher than those of other sales does not necessarily place the sales outside the ordinary course of trade"); *Sulfur Dyes, Including Sulfur Vat Dyes, From The United Kingdom*, supra, 58 Fed. Reg. at 3256 ("sale at a greater quantity and lower price than other sales to the same customer land" \* \* \* out of line with prices and quantities of the vast majority of respondents' other sales transactions in the home market"); and *Granular Polytetrafluoroethylene Resin From Japan*, supra 58 Fed. Reg. at 50345 ("extremely small quantities of [evaluation samples] at prices substantially higher than the prices of the vast majority of sales reported" excluded.)

<sup>34</sup> The URAA replaced "such or similar merchandise" with "foreign like product." Compare 19 U.S.C. § 1677(16) (1988) with 19 U.S.C. § 1677(16) (1994).

<sup>35</sup> Def's Supp. Resp. at 11, referencing *Gray Portland Cement and Clinker From Mexico*, 62 Fed. Reg. 17581, 17585-86 (Apr. 10, 1997) (Final Review Results) ("In the second review, the Department's determination that CEMEX's Type II and V sales were outside the ordinary course of trade hinged on a comparison between home market sales of Type I cement and Type II and V cement." See also *Gray Portland Cement and Clinker From Mexico*, 63 Fed. Reg. 12704, 12771 (Mar. 16, 1998), which distinguished sales of Type II cement as outside the ordinary course of trade because 1) it was a specialty cement sold to a niche market, 2) shipping distances and freight costs were significant, and 3) there existed a "promotional quality" for Type II cement that did not exist for other types of cement.

tice in these cases is to conduct its ordinary course of trade analysis with respect to all home market sales of merchandise of the same class or kind as subject merchandise.<sup>36</sup>

Regarding prices and quantities, the government responds that Commerce correctly compared the conditions and practices of the subject merchandise to the conditions and practices of merchandise of the "same class or kind" and it argues Ausimont's arguments are unavailable because adjustments to account for such are available under 19 U.S.C. § 1677b(a)(6)(C)(ii). Def's Resp. at 34-35. See 19 U.S.C. § 1677(15). It further argues that the fact that certain PTFE "models" had higher profits than the contested sales validated that the latter were within the "normal" range of profits for sales of PTFE granular resin. Also, it points out that it was Ausimont's suggestion to compare gross rather than net profit, but whether net profit is more indicative of profitability it asserts Commerce has discretion to decide what circumstances render highly profitable sales extraordinary. *Id.* at 33, referencing *Mitsubishi Heavy Industries, Ltd.*, *supra*, 22 CIT at 568, 15 F. Supp.2d at 830.

Regarding Ausimont's argument on the absence of a "market" for wet reactor bead in Italy, the government argues that Ausimont's 1993-94 questionnaire response statements dispelled the notion that the contested sales were not as "unusual" as Ausimont suggested and "revealed" that in fact wet reactor bead sales were made "over time." Because the contested sales were (1) transacted with one of Ausimont's regular customers, who purchased granular PTFE resin as well, (2) within the range of profits for all of the company's resin sales, and (3) repeat occurrences, the government argues Commerce was justified in finding that the contested sales were "normal." Def's Resp. at 32. Again, it asserts the possibility of drawing two inconsistent conclusions from these facts does not mean that Commerce's conclusion is unsupported by substantial evidence. Def's Resp. at 35-36. DuPont adds that Commerce's view of products or sales in one proceeding has no bearing on whether particular transactions are outside the ordinary course of trade in a subsequent proceeding. DuPont's Resp. at 23, referencing *Koyo Seiko*, *supra*, 20 CIT at 783-84, 932 F. Supp at 1497-98.

The government states usage should not even be considered because Ausimont did not raise argument thereon in its administrative case brief. Def's Resp. at 32. DuPont, however, states that it is "incorrect" to assert that the use of wet reactor bead is dissimilar to granular PTFE resin because it contains all the latter's "essential" characteristics and can be "easily" transformed into the finished product, as Commerce concluded when it included wet reactor bead within the scope of the an-

<sup>36</sup> DuPont's Supp. Resp. at 9, referencing *Certain Corrosion-Resistant Carbon Steel Flat Products from Japan*, 64 Fed. Reg. 12951 (Mar. 16, 1999) ("The particular facts of this case do not support a finding that the sales to the customer at issue were extraordinary transactions in relation to other sales transactions. There is no record evidence demonstrating any significant distinction between the sales at issue and other home market sales"); *Polyvinyl Alcohol from Taiwan*, 61 Fed. Reg. 14064, 14068 (Mar. 29, 1996).

tidumping duty order against granular PTFE resin from Italy. DuPont's Resp. at 22.

Regarding the terms and conditions of the contested sales, the government insists Commerce did not have an opportunity at verification to explore the issue of differences between the contested sales and other sales since the documents gathered were not collected for that purpose and Ausimont did not raise the issue until after the preliminary determination. The government distinguishes the observation in *Murata* that sales canceled before invoicing are indicative of extraordinary sales as one of several leading to Commerce's determination. Def's Supp. Mem. at 17, referencing *Murata Mfg. Co.*, *supra*, 17 CIT at 263, 820 F. Supp. at 606. DuPont emphasizes that the verified documents were inconclusive because "pending orders" are indistinguishable from "open orders" for granular PTFE resin since these are mere indications of intention to purchase a quantity of granular PTFE resin at a particular price but not commitment; it is only when the purchaser informs of the desired quantity that price is established and the invoice is prepared.<sup>37</sup> It points to Ausimont's responses to the first questionnaire that "[p]rices are negotiated on a case-by-case basis with individual customers" and "are made on a delivered basis".<sup>38</sup> See generally DuPont's Resp. at 25-26 & app. 13.

Responding to the "usual commercial quantities" facet of Ausimont's claim, the government and DuPont state it is Commerce's practice<sup>39</sup> to examine whether there is a clear correlation between price and quantity, that Ausimont first raised the issue in its administrative case brief, that Ausimont provided no such demonstration, and that even if the Court reaches the merits of the issue Ausimont has not demonstrated error in Commerce's conclusion. Def's Resp. at 40-43; DuPont's Resp. at 37-39. DuPont adds that even if evidence of price-quantity correlation had been provided, the contested sales were not unusual or unrepresentative of commercial sales quantities given the fact that [ ] home-market transactions of foreign like product were larger than the contested sales, [ ] exceeded [ ] thousand kilograms, and [ ] were in the [ ] to [ ] thousand kilogram range.<sup>40</sup>

### C

The ultimate question is whether there is substantial evidence on the record to support Commerce's determination not to exclude the contested sales. The purpose of excluding extraordinary sales "is to prevent dumping margins from being based on sales which are not representative." *Monsanto Co. v. United States*, 12 CIT 937, 940, 698 F. Supp. 275, 278 (1988). By statute, "ordinary course of trade" is defined to mean the

<sup>37</sup> See QR 1 at A-10-11 (PDoe 13, Fiche 5, Frs. 20-21; CDoc 1, Fiche 13, Frs. 20-21).

<sup>38</sup> See *id.* at A-6 (PDoe 13, Fiche 5, Fr. 16; CDoc 1, Fiche 13, Fr. 16).

<sup>39</sup> At least, prior to the URAA it was. See *Fabrique de Fer de Charleroi S.A. v. United States*, 22 CIT 6, 11, 994 F. Supp. 395, 399 (1998). See e.g. *Iron Construction Castings from Canada*, 56 Fed. Reg. 23274, 23276 (May 21, 1991); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan*, 52 Fed. Reg. 30700, 30703 (Aug. 17, 1987) (Final Determin. LTFV).

<sup>40</sup> DuPont's Resp. at 38, referencing QR 1 at Ex. B-2 (CDoc 1, Fiche 15, Fr. 53-87). See DuPont's ConApp. 4.

"conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind". 19 U.S.C. § 1677(15). Claims of extraordinary sales are concerned with what "ordinary course of trade" is not,<sup>41</sup> therefore 19 C.F.R. § 351.102(b) evinces a case-by-case approach to the problem which has been repeatedly sustained. See, e.g., *NTN Bearing Corp. of America v. United States*, Slip Op. 01-76, 2001 WL 708718 (June 22, 2001); *NSK Ltd. v. United States*, Slip Op. 01-69, 2001 WL 630967 (June 6, 2001); *Torrington Co. v. United States*, 25 CIT \_\_\_, 146 F. Supp. 2d 845 (2001); *Bergerac, N.C. v. United States*, 24 CIT \_\_\_, 102 F. Supp. 2d 497 (2000).

In general, Ausimont criticizes the *Final Results* for analyzing each factor in isolation and from the perspective of whether the particular factor alone was so unusual as to render the contested sales outside the ordinary course of trade. If that is on the mark, that would not be in accordance with the "totality of the circumstances standard" enunciated in 19 C.F.R. § 351.102(b). Each relevant factor must, nonetheless, be considered.

Commerce agreed that volume and frequency represented small percentages but concluded that the fact that their absolute amount was "larger on average than for other sales" was more important (*i.e.* "not insignificant".) The Court disagrees with Ausimont's theory that it was inconsistent to consider an absolute amount not insignificant in the analysis of volume but consider the same fact not significant when analyzing quantity. These are different perspectives, not polar opposites, and analysis of volume may be effected by frequency. Broadly speaking, examination of absolute amounts in addition to (or, possibly, as substitute for) relative volume would not be *per se* inconsistent with Commerce's statutory mandate, and Commerce has "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence," *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985), however an absolute value has no inherent significance: it is the *context* of an observation which confers its significance. Cf. *USX v. United States*, 11 CIT 82, 85, 655 F. Supp. 487, 490 (1987) ("it is the *significance* of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)") (emphasis in original.) Of

<sup>41</sup> 19 C.F.R. § 351.102(b) was the result of amendment to 19 C.F.R. § 353.46 (1996) "so as to emphasize the fact-specific nature of ordinary course of trade analysis" and conform to the URAA. 62 Fed. Reg. 27296, 27299 (May 19, 1997). International trade analysis is "fact specific," of course, but the regulation provides that sales outside the ordinary course of trade as those which "have characteristics that are extraordinary." Apart from that tautology, it also provides a non-exclusive list of examples, including merchandise that is "off-quality" or "produced according to unusual specifications" and transactions "at aberrational prices," or with "abnormally high profits" or "unusual terms of sale," or "to an affiliated party at a non-arm's length price," and in the final analysis a determination must be "based on an evaluation of all of the circumstances particular to the sales in question." 19 C.F.R. § 351.102(b).

course, the context itself must be meaningful.<sup>42</sup> Elsewhere, Commerce has stated that examination of *relative* volume and frequency is a "long-standing practice."<sup>43</sup> Here, however, Commerce offered only the observation that the contested sale amounts were larger on average than other sales, without explanation for the necessity of adopting a different approach to considering volume and frequency and little further elaboration. In light of the fact that the contested sales' frequency was less than one half of one percent and their volume approximately 2.0 percent of home market sales, the reader is left wondering what is significant about the fact that they are larger on average than "other sales," even assuming the *Final Results* are read to mean "all" or "most." Cf. *Rautaruukki Oy v. United States*, Slip Op. 99-39, 1999 WL 270028 (1999); *Rautaruukki Oy v. United States*, 22 CIT 786, 790, 1998 WL 465219, at \*3 ("neither must the court regard as substantial evidence seemingly nominal differences in chemical composition, the significance of which Commerce has not explained.")<sup>44</sup>

The government contends that because ordinary course of trade determinations are case-by-case, Commerce did not have to explain further in light of *Allied Signal*. Such an interpretation must be rejected. A reviewing court must understand the basis of the agency's action in order to be able to judge the consistency of that action with the agency's general mandate. See *Chennault v. Department of the Navy*, 796 F.2d 465 (Fed. Cir. 1986).<sup>45</sup> *Allied Signal* neither disturbs the well-established principle that an agency must articulate a "rational connection between the facts found and the choices made," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), nor relieves Commerce from explaining any departure from "established" agency practice. See *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1971). The apparent administrative preference being analysis of rela-

<sup>42</sup> See, e.g., *Canned Pineapple Fruit From Thailand*, supra, 60 Fed. Reg. at 29562-63 ("Dole's single third country sale of this product constituted an insignificant portion of its total German sales volume.") Cf. *USX v. United States*, 11 CIT 82, 85, 655 F.Supp. 487, 490 (1987) (rejecting ITC's analysis of market penetration data which consisted solely of the statement that levels of market penetration remained low and stable, without discussion of the significance of this trend or its relationship to other facts uncovered in the investigation); *Federal Mogul Corp. v. United States*, 20 CIT 234, 261-263, 918 F.Supp. 386, 410-11 (1996) (congressional silence on "significant" content of further-manufactured imports and application of the Roller Chain rule.) On this point, Commerce's own practice appears to indicate awareness. See, e.g., *Fresh Tomatoes From Mexico*, 61 Fed. Reg. 56808, 56610 (Nov. 1, 1996) (Prelim. Determin. LTFV) (discussion on targeted dumping); *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg. 38139, 38162 at Comment 12 (July 23, 1996) (Final Determin. LTFV). But, on whether there is substantial evidence to uphold a determination that an absolute amount of wet reactor head sold was "not insignificant," the Court has been requested to contemplate the matter under the "significance" of the weight of dead fish from *Fresh Atlantic Salmon*, a prospect few would relish, if any.

<sup>43</sup> Decision Memorandum, *Gray Portland Cement and Clinker From Mexico*, supra, 65 Fed. Reg. 13943. Indeed, Commerce apparently considers volume and frequency of such import that under certain conditions they prove sales are unusual, obviating consideration of other factors, although that would appear to be the exceptional situation. Compare *id.* with, e.g., *NTN Bearing Corp. of America v. United States*, 23 CIT \_\_\_\_, \_\_\_\_, 83 F.Supp. 2d 1281, 1288 (1999).

<sup>44</sup> Regarding volume, cf. also *Craig v. Boren*, 429 U.S. 190, 201-202 (1976) ("if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit'."). The Court also finds it of interest that Commerce normally requires foreign like product sales of 5% of the aggregate quantity or value of U.S. subject merchandise sales in order to find a "viable" overseas market for comparison purposes. See 19 C.F.R. § 351.404(b).

<sup>45</sup> Furthermore, if a reviewing court cannot connect the dots between the agency's considered factors and the action taken, the agency's determination may be considered arbitrary or capricious. See, e.g., *Consolidated Bearings Co. v. United States*, Slip Op. 01-66, 2001 WL 607015, \*8 (June 5, 2001); *Sanyo Electric Co., Ltd. v. United States*, 23 CIT \_\_\_\_, \_\_\_\_, 86 F.Supp. 2d 1232, 1239 (1999); *The Humane Society of The United States v. Clinton*, 23 CIT \_\_\_\_, \_\_\_\_, 84 F.Supp. 2d 260, 269, 277 (1999); *NTN Bearing Corp. of America v. United States*, 19 CIT 1165, 1170, 903 F.Supp. 62, 67 (1995); *Sugiyama Chain Co., Ltd. v. United States*, 19 CIT 328, 333, 880 F.Supp. 869, 873 (1995).

tive volume and frequency, not absolute amount, the matter will be remanded for consideration therefor or explanation why such would be insufficient.

There also appear to be flaws in the *Final Results* in the analyses on quantity, price, and profit. Ausimont argued that average quantities five times that of granular PTFE resin cannot be considered "normal" for this other type of PTFE. In dismissing this proof, Commerce stated there was an insufficient basis in the record for determining whether "this difference" in quantity "is in fact attributable to circumstances rendering the sales in question extraordinary or unrepresentative of normal sales."<sup>46</sup> On the one hand, this reasoning appears circular: to show extraordinary sales Commerce required Ausimont to prove significantly different quantities, but to prove the quantities significantly different, Ausimont was, in effect, required to prove that the sales were extraordinary or unrepresentative. Whether the reason for a difference is indiscernible, that does not negate the degree of the difference itself, which must be considered in the context of the totality of the circumstances unless the comparison is inappropriate. On the other hand, there were no other home market sales of wet reactor bead for comparison purposes, and Commerce may have regarded the quantitative comparisons through the prism of granular PTFE resin sales and questioned the assumption of *ceteris paribus* ("all other things being equal.") Certainly it did so with respect to Ausimont's comparison on price, which was dismissed on the ground that wet reactor bead and granular PTFE resin are different products for which there is no reasonable expectation of similar selling prices. Such logic should apply across the board, yet Commerce contradicted, by considering the "range" of the contested sale quantities not "so unusual as to render such sales inappropriate for our analysis,"<sup>47</sup> and by observing higher profits on certain models of granular PTFE in order to negate the degree of disparity in profits for the contested sales as a whole.<sup>48</sup> If *ceteris paribus* does not hold, then the fact that an observation falls within the range of a given "normal" population is doubtful, since the comparison is question-

<sup>46</sup> The *Final Results* also state that "the fact that home market sales of wet reactor bead were made in quantities higher than average does not support a conclusion that a normal value based on the price of such sales would be unreasonably high." If this was not intended to set an even higher standard for Ausimont to surmount, it is either a *non sequitur* (at best) or it is jumping the gun.

<sup>47</sup> Again, determining whether a fact is significant or insignificant is precisely the agency's fact finding function. *Maine Potato Council v. United States*, 9 CIT at 300, 613 F. Supp. at 1244, but the reader should not be left wondering what measure was employed therefor. Also, in framing the ordinary-course-of-trade provision, Commerce expressly rejected the suggestion that all sales should be presumed ordinary. See *Antidumping Duties: Countervailing Duties*, supra 62 Fed. Reg. at 27299. Notwithstanding the burden of proof on Ausimont, a standard which requires a claimant to "render such sales inappropriate to use such sales in the analysis" presumes precisely that.

<sup>48</sup> Commerce also rejected, apparently, Ausimont's profit comparison on the ground that "the identification of sales as having high profits does not necessarily render such sales outside the ordinary course of trade." 63 Fed. Reg. at 49082 (citation omitted). That may be true as a general statement, see, e.g., *Torrington Co. v. United States*, supra, Slip Op. 01-56 (May 10, 2001) at 21, 146 F. Supp. 2d at \_\_\_\_ (2001 WL 501205 at \*7), but if offered as justification it is evasive. Under the totality of the circumstances, high profitability can be probative on whether sales were outside the ordinary course of trade. See *CEMEX, S.A. v. United States*, 133 F.3d at 901. The inquiry should be focused on the degree of profitability involved as compared with what is considered "normal in the trade under consideration with respect to merchandise of the same class or kind". 19 U.S.C. § 1677(15).

able.<sup>49</sup> But if comparison of different product types is appropriate and meaningful in considering whether sales were extraordinary, then it was unreasonable to dismiss Ausimont's comparison on the ground that wet reactor bead and granular PTFE resin are different products for which there is no reasonable expectation of similar selling prices.

In order to know what is extraordinary, one must obviously know what is ordinary. In accordance with administrative and judicial precedent, Ausimont pointed to statistical proofs showing that the contested sales were in greater quantities, lower prices, and higher profits than the "vast majority" of "ordinary" merchandise. See, e.g., *Thai Pineapple Public Co.*, *supra*. See also *supra*, note 15. Ausimont deduced that when considered as a part of the "totality of the circumstances" such proofs tended to show that the contested sales are extraordinary. The parties dispute whether the demonstrated degrees of difference between wet reactor bead and granular PTFE resin contribute to the resolution of that issue. At a minimum, the comparisons highlight the degrees of difference between wet reactor bead and granular PTFE resin, and from the parties arguments it appears there is implicit agreement that wet reactor bead and granular PTFE resin are not equivalent products: they are distinct types of PTFE. The government and DuPont defend type-to-model comparisons but acknowledge Commerce was "well aware" of the differences between wet reactor bead and granular PTFE resin, and the *Final Results* indicate reliance on such differences to dispute the validity of aggregate quantitative comparisons. The differences between the products may not be those of apples and oranges, but they are at least as pronounced as those of apples and applesauce. Cf. *Calcium Aluminate Cement, Cement Clinker and Flux From France*, *supra*.<sup>50</sup> However the disagreement is resolved,<sup>51</sup> sales must be examined for what they are, whether or not there is formal division into distinct foreign like product categories or aggregate data analysis. In the Court's opinion, the *Final Results* fall short of appropriate and full consideration of such differences or adequate reasoning why such would not be meaningful, and it is therefore necessary to remand the matter for further reflection.

Commerce also rejected Ausimont's usual-commercial-quantities claim for the same reasons it rejected Ausimont's arguments on quantity in the context of the ordinary-course-of-trade claim, not on the basis of a failure to demonstrate a price-quantity correlation. Because it is

<sup>49</sup> Furthermore, formal logic holds that "if A, then C" is not the same as "if C, then A," unless the two are proven to be reflexive of one another. See *Wells Fargo & Company And Subsidiaries v. Commissioner of Internal Revenue*, 224 F.2d 874, 882 (8th Cir. 2000).

<sup>50</sup> Considering the parties arguments on *Calcium Aluminate Cement, Cement Clinker and Flux From France*, the fact that the determination is concerned with § 1677(15) and not § 1677(16) is immaterial. To disclaim authority for distinguishing wet reactor bead from granular PTFE resin because of a "clear preference" for price-to-price comparison and the "hierarchical rules" in § 1677(16), if that is the argument, is to put the cart before the horse: the determination of NV and the appropriate "foreign like product" is premised on sales which were made in the ordinary course of trade. See 19 U.S.C. § 1677(a)(1)(B)(i). Commerce's discretion in the appropriate selection of foreign like product, see *Koyo Seiko*, 66 F.2d 1204 (Fed. Cir. 1995), is not in doubt.

<sup>51</sup> Ausimont points out that the government "conceded" that Commerce analyzes different product types by comparing variable differences on the basis of aggregate sales. Pls' Supp. Mem. at 17, referencing *Gray Portland Cement and Clinker From Mexico*, *supra*, 62 Fed. Reg. at 17587; *Pipes From India*, *supra*. In any event, Commerce must correct and, as necessary, clarify the *Final Results* in accordance with this opinion and consistently with administrative practice.

necessary for Commerce to reconsider quantity in accordance with the foregoing, this issue will also be remanded for reconsideration. The Court further notes Ausimont's assertion that since passage of the URAA, Commerce has excluded unusual-commercial-quantity sales without reference to price-quantity correlation. Pls' Supp. Rep. at 23-24, citing *Steel Wire Rod From Canada*, *supra*, 63 Fed. Reg. 9182; *Pure and Alloy Magnesium from Norway*, 57 Fed. Reg. 30942 (July 13, 1992) (Final Neg. Determ.); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From The Federal Republic of Germany*, 56 Fed. Reg. 31692 (July 11, 1991).

In considering the "market" for the subject merchandise and "merchandise of the same class or kind," whether an importer has made sales in the ordinary course of trade depends upon whether the importer made the sales under conditions that are normal for the product being sold, not whether the importer ordinarily sells the merchandise. *East Chilliwick Fruit Growers Co-operative v. United States*, 11 CIT 104, 108, 655 F. Supp. 499, 504 (1987). Minimal sales or demand may be probative on the market conditions for a product, *e.g. Thai Pineapple Public Co.*, *supra*, and market conditions may be inferred from the record evidence. *Mantex*, *supra*, 17 CIT at 1405, 841 F. Supp. at 1307. The presence of demand does not necessarily indicate a meaningful market. *Gray Portland Cement and Clinker From Mexico*, *supra*, 64 Fed. Reg. at 13157.

It is noted, as DuPont asserts, that Commerce's view of products or sales in one proceeding might have little bearing on whether particular transactions are outside the ordinary course of trade in a subsequent proceeding. See *Heveafil Sdn. Bhd. v. United States*, Slip Op. 01-22 at 26, 2001 WL 194986 at \*11, note 12 (Feb. 27, 2001)<sup>52</sup> ("It is well established that Commerce may change its position as long as it provides adequate explanation for such a change.") (citations omitted.) However, the inquiry must take into account the conditions and practices which have been normal in the trade under consideration with respect to merchandise of the same class or kind "for a reasonable time prior to the exportation of the subject merchandise," 19 U.S.C. § 1677(15), and the circumstances of a particular case will determine what is a "reasonable" time prior to the exportation of the subject merchandise. The *Final Results'* rationale was that "Ausimont's claim regarding the absence of past home market sales of this merchandise focuses entirely on the immediately prior review, without addressing the fact that the respondent has in fact sold wet reactor bead in the home market in previous *segments* of this proceeding." 63 Fed. Reg. at 49082 (highlighting added). Commerce paints with too broad a brush: the record shows wet reactor bead was previously sold only during the 1993-94 segment. Furthermore, whether Commerce was attempting to support finding the exis-

<sup>52</sup> See also *Koyo Seiko*, *supra*, 20 CIT at 784, 932 F. Supp. at 1498; *Cultivos Miramonte S.A. v. United States*, 21 CIT 1059, 1064, 980 F. Supp. 1268, 1274 (1997); *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988).

tence of a market or merely refuting Ausimont's contention that there was no market, it had to stretch back across four segments and five years for such. Nonetheless, the government and DuPont urge that it was reasonable to conclude that the market for the contested sales was "significant" because these were repeat occurrences to one of Ausimont's regular customers.

Under different circumstances the argument might prevail, however in *Canned Pineapple Fruit From Thailand* it was the fact that a single customer was involved which was determined controlling. The fact that the customer was regular was not. See *Thai Pineapple Public Co.*, *supra*, 20 CIT at 1315, 946 F. Supp. at 16. See also 60 Fed. Reg. at 29563. In view of the similarity of circumstances to that instance, it was unreasonable to reach a contrary determination here without further explanation or appropriate differentiation. Moreover, Commerce observed that in the 1993-94 circumvention proceeding, similarly, Ausimont reported it "produces and sells PTFE wet reactor bead to home-market customers in Italy." 63 Fed. Reg. at 49082 (citation omitted). There were two such sales in Italy at that time, which Commerce determined constituted "virtually no market," with the result that Commerce relied on cost of production data to determine that the difference in value between wet reactor bead imported into the United States and U.S. sales of granular PTFE resin was "small." See note 23, *supra*. For this POR, Ausimont reported, similarly, three home market sales of wet reactor bead. Using frequency as a guide, there is "virtually" no difference between this number and those considered in the 1993-94 segment. Accordingly, consideration of market must be remanded for similar treatment or adequate further explanation.

The last factor for consideration is Ausimont's argument on the fact that the terms of and conditions for the contested sales were different. In the *Final Results*, Commerce agreed that the documentation of the contested sales it had collected during verification showed different terms of sale for wet reactor bead and for granular resin. Nevertheless, it avoided consideration of those differences on the ground that it "did not examine or collect these exhibits for this purpose and Ausimont officials did not discuss such differences at verification." 63 Fed. Reg. at 49082. Thus, Commerce stated it was unable to conclude from the documentation that the terms of sale for wet reactor bead "generally differed significantly" from finished granular PTFE resin "or that different terms of sale are not generally applicable to all sales." *Id.*

Ausimont argues that this is insufficient, because Commerce was required to verify the terms of trade for granular PTFE resin, which it did by selecting what it considered was a representative sample of five sales. To the extent the argument addresses the apparent procedural barrier to consideration erected by Commerce, the Court agrees. The comparison of terms and conditions between products sold in the U.S. and foreign markets is essential to the dumping inquiry. See *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1575 n.1 (Fed. Cir. 1995), quoting

Joseph E. Pattison, *Antidumping and Countervailing Duty Laws*, § 1.02[1] (1994). Furthermore, Commerce is required to "verify all information relied upon in making \* \* \* a final determination in a review under [19 U.S.C.] section 1675(a)." 19 U.S.C. § 1677m(i) (1994) (highlighting added). Commerce may use averaging and statistically valid samples and has exclusive authority in the selection thereof, *see* 19 U.S.C. § 1677f-1 (1994), and for its purposes it chose five granular PTFE resin sales for verification. It thereby verified the terms and conditions of granular PTFE resin sales in Italy.

At a minimum, Commerce's response to Ausimont's argument indicates comparison of wet reactor bead and granular PTFE resin terms and conditions was appropriate to the inquiry. The *Final Results* state Commerce did not examine or gather documentation "for this purpose." The Court does not interpret Commerce's statement as disavowal of verification of the terms and conditions for wet reactor bead and granular PTFE resin sold in Italy, since the purpose for seeking the documentation matters not, and the hierarchy of 19 U.S.C. § 1677(16) does not authorize relaxation of agency inquiry into the terms and conditions of wet reactor bead and granular PTFE resin sold in Italy, *i.e.* the "hierarchical rules" would only matter post-verification. If clarification of the terms and conditions for any of the examined sales was necessary, that is the purpose of verification, but if there were matters pertaining to the alleged differences between the wet reactor bead sales and granular PTFE resin sales in Italy into which Commerce would have required clarification from officials at Ausimont's Bollate facility, neither the government nor DuPont offered further explanation, and the Court will not speculate. Hence, the rationale in the *Final Results* cannot be sustained, since they are unsupported by substantial evidence on the record, and there appears no basis for not proceeding to consider the differences of terms of trade on the basis of the documentation in the record. This matter will therefore be remanded to Commerce.

Whether the terms and conditions for the contested sales can be said to be "unusual", *see* 19 C.F.R. § 351.102(b), such that they support concluding that the contested sales were extraordinary would depend, again, upon what is usual or unusual in the market for the product(s) in question. *Cf. East Chilliwick Fruit Growers Co-operative, supra*, 11 CIT at 108, 655 F. Supp. at 504. As discussed above, the "market" for wet reactor bead may be in doubt, but the Court notes that "unusual" terms and conditions have included cancellation of orders. *See Murata Mfg. Co., supra*. Ausimont directs attention to the facts that the contested sales were on a "pending" order versus an "open" order basis and that it cancelled part of a sale and that prices for wet reactor bead are adjusted to reflect their dry weight and that prices for wet reactor bead in Italy were not "standard" but were separately negotiated and so forth, but it is for Commerce to decide, at this point, what impact or weight such considerations have in the analysis.

## II

Ausimont's second claim concerns the correct amount of statutory profit to allocate to the importations of subject merchandise. In the *Final Results*, Commerce explained that its calculation of CEP profit is consistent with its statutory interpretation of "total United States expenses" and administrative practice. *Final Results* at 49083-49084, referencing *Canned Pineapple Fruit from Thailand: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 7392, 7395 (Feb. 13, 1998); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France et al.*, 62 Fed. Reg. 2081, 2127 (Jan. 15, 1997) (*Final Rev. Results*). See 19 U.S.C. § 1677a(f) (1994).

All of Ausimont's U.S. sales of subject merchandise required the use of CEP, a calculation which approximates *ex factory* price by taking the first arm's length U.S. selling price and reducing it by:

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

(D) any selling expenses not deducted under subparagraph (A), (B), or (C);

(2) the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e) of this section; and

(3) the profit allocated to the expenses described in paragraphs (1) and (2).

19 U.S.C. § 1677a(d) (1994). The statutory profit ("CEP profit") in subsection (3) is described at 19 U.S.C. § 1677a(f), and is determined by multiplying "total actual profit" by the "applicable percentage," which is the ratio of "total United States expenses" to "total expenses."<sup>53</sup> 19 U.S.C. § 1677a(f)(1) (1994). "Total United States expenses" are defined at 19 U.S.C. § 1677a(f)(2)(B) as "the total expenses described in subsection (d)(1) and (d)(2)" above, and "total expenses" are defined as

all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:

<sup>53</sup> The calculation of CEP profit depends upon data submitted by the respondent in the CV or COP database. Where a respondent is not required to submit CV or COP information, Commerce relies on expense and profit information derived from the respondent's financial reports.

(i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.

19 U.S.C. § 1677a (f)(2)(C).

The term "total actual profit" is defined as:

the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) [above] with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.

19 U.S.C. § 1677a (f)(2)(D).

The foregoing may be restated as follows, a formula to which Commerce adheres:

$$\text{CEP Profit} = \text{Total Actual Profit X } \frac{\text{Total U.S. (Selling) Expenses}}{\text{Total Expenses}}$$

The calculation of CEP profit is a two-step process. *See generally* Import Administration Policy Bulletin 97/1 (Sep. 4, 1997). When calculating "total actual profit," Commerce essentially subtracts "total expenses" from total global revenues (net of rebates and discounts) for subject merchandise and foreign like product based on aggregation of per-unit information. Commerce calculates "total expenses" as the sum of "cost of merchandise," "selling expenses," and "movement/packing costs" for the U.S. and comparison markets. "Cost of merchandise" is treated as the sum of manufacturing, general and administrative expenses, and includes actual (global) net interest expenses derived from a respondent's CV database (in the case of subject merchandise) and COP database (in the case of foreign like product.) The total U.S. and comparison market "selling expenses" include direct and indirect selling expenses and any further manufacturing costs incurred in the United States. At this stage, however, "selling expenses" take no account of imputed credit expenses and inventory carrying costs. *Id.*

Having calculated "total actual profit," the "applicable percentage" is calculated based on the same "total expenses" which were calculated in accordance with the foregoing (*i.e.*, it includes actual global net interest expenses,) but at this stage, Commerce requires the addition of imputed credit and inventory carrying cost expenses in the calculation of "total United States expenses," the numerator of the CEP profit ratio.<sup>54</sup> In other words, total U.S. "selling expenses" mean different things at the different stages of the CEP profit calculation. The reason, Commerce generally offers, is because the calculation of "actual profit" takes into account "actual interest." *Id. See id.* at n.5.

<sup>54</sup> Commerce also considers that: [f]rom a computer programming standpoint, it may be easier and more efficient to compute the amount of CEP profit using a single ratio of total actual profit to total actual expenses [which] \* \* \* would then be applied to [total United States expenses]. Import Administration Policy Bulletin 97/1 n.6 (Sep. 4, 1997). *Cf. Final Results* at 49084 ("applying this rate to a U.S. selling expense pool inclusive of [imputed] expenses".)

Ausimont's complaint is that including imputed credit expenses and inventory carrying costs in the "total United States expenses" numerator but not in the "total expenses" denominator artificially inflated the CEP profit allocated to each U.S. sale. The government counters that interest expenses actually incurred are already included in the denominator, and therefore to include imputed expenses in the denominator would be double counting. Def's Resp. at 48, referencing *Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands*, 62 Fed. Reg. 18476, 17479 (Apr. 15, 1997) (Final Rev. Results). The government states Commerce's position is predicated upon the Statement of Administrative Action, H.R. Rep. No. 103-826 at 656 (1994) ("SAA"), which accompanied the URAA (p. 825):

total profit is calculated on the same basis as the total expenses \* \* \* [and n]o distortion in the profit allocable to U.S. sales is created if total profit is determined on the basis of a broader product-line than the subject merchandise, because the total expenses are also determined on the basis of the same expanded product line. Thus the larger profit pool is multiplied by a commensurately smaller percentage.

Ausimont relies for support on *Thai Pineapple Canning Industry Corp., Ltd. v. United States*, Slip Op. 99-42, 1999 WL 288772 (1999), however the rationale for the decision was derived from *U.S. Steel Group—A Unit of USX Corp. v. United States*, 22 CIT 670, 15 F. Supp. 2d 892 (1998), which was recently reversed by the Court of Appeals for the Federal Circuit ("CAFC"). See *U.S. Steel Group—A Unit of USX Corp. v. United States*, 225 F.3d 1284 (Fed. Cir. 2000). The CAFC found ambiguity in 19 U.S.C. § 1677a(f)(2), applied *Chevron* "deference"<sup>55</sup>, and found the inclusion of movement expenses in "total expenses" a "permissible" construction of the statute. *U.S. Steel Group—A Unit of USX Corp. v. United States*, 225 F.3d 1284, 1292 (Fed. Cir. 2000). Of interest is the point that the appellate judges regarded 19 U.S.C. § 1677a as equating "total expenses" with "all expenses," yet found that the statute's "plain language and structure"<sup>56</sup> undercut this court's interpretation of the ratio of "total U.S. expenses" to "total expenses" as requiring symmetry as a matter of mathematical logic. That would appear, likewise, to undercut Ausimont's argument here.

Furthermore, in this court's prior examination of the remand results from Commerce, although it accepted the plaintiff's comment that "the manner of calculating U.S. imputed interest expenses may result in some cases in amounts which are not fully reflected in the total interest expenses figure which is used in the denominator of the CEP profit ra-

<sup>55</sup> In reviewing an agency's construction of a statute that it administers, if "Congress has directly spoken to the precise question at issue," then a reviewing court and the agency "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. v. United States*, 467 U.S. 837, 842-43 (1984). If Congress has not directly spoken on the issue, a reviewing court must inquire whether the agency's interpretation "is based on a permissible interpretation of the statute" and, if so, defer to it. *Id.*

<sup>56</sup> Aside from ambiguity, the CAFC will apply *Chevron* deference to agency statutory construction but reviews this court's statutory interpretation without deference. 225 F.3d at 1286, citing *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994). Compare *U.S. Steel Group—A Unit of USX Corp. v. United States*, 225 F.3d 1284, 1290 (Fed. Cir. 2000), with *id.*, 22 CIT 670, 676, 15 F. Supp. 2d 892, 896 (1998).

tio," it also accepted the government's avoidance-of-double-counting theory. *Thai Pineapple Canning Industry Corp., Ltd. v. United States*, Slip Op. 00-17 at 19-20, 2000 WL 174986 at \*6 (Feb 10, 2000). The court further considered that the plaintiff could not establish that the applicable percentage in that case was in fact distorted, for example (and without implying that these are actually distortive) because of "differing expenses over time" or "no or little actual U.S. interest expenses, but only imputed U.S. expenses," *id.*, and such reasoning would apply here as well. The record does not appear to support a finding in favor of Ausimont. Cf. A-6 (PD 13, Fiche 5, Fr. 16; CD 1, Fiche 13, Fr. 16) (warehousing); Letter enclosing updated U.S. and home market databases from Ausimont to Commerce of 12/19/97 (CDOC 3, Fiche 14, Frs. 97-98, Fiche 15, Frs. 2, 5, 7-8) (financial statements.)

Ausimont also argues that imputed credit expenses and inventory carrying costs (included in "total United States expenses") and global net interest expenses (included in "total expenses") are different *categories* of expenses calculated using different rates of interest, time periods, and product values. Global net interest expenses are actual interest expenses associated with total operations in the U.S., comparison and third-country markets and are computed by allocating consolidated actual interest expenses reported on company's financial statements (*i.e.* the sum of short- and long-term borrowing expenses) to production activities in the U.S. and comparison markets. By contrast, imputed credit expenses and inventory carrying costs are calculated based on receivable periods, short-term borrowing rates, gross unit prices, inventory values, and holding periods. In other words, Ausimont argues, they are opportunity costs not reflected in the financial statements but are associated, *ipsi dixit*, with selling to activities in the United States and comparison markets. Pls' Rep. at 57-59 and n.27. See 19 U.S.C. § 1677a(d)(1)(C) (1994). Ausimont's contends that in the "real world," the common business practice is to delay payment to vendors in order to offset delayed payments from purchasers such that the "opportunity costs" are associated with selling activities only in theory, not in reality. Pls' Rep. at 60 and n.28, (citations omitted). Therefore, Ausimont contends the implication that opportunity costs "result" in increased short-term borrowings or delayed retirement of debt, *see* DuPont's Resp. at 41,<sup>57</sup> is not, necessarily, true in a well-managed company, and certainly not with respect to Ausimont itself. "Simply put, the time value of money applies equally to money flowing in and money flowing out," Ausimont argues, and from this it concludes that Commerce's assertion that the actual interest expenses in the denominator of the CEP profit

<sup>57</sup> In *Thai Pineapple Canning Industry, Ltd.*, the government also argued:

The annual interest expense incurred by a company, and reported as an element of COP/CV, will reflect the extent to which the company does not immediately receive payment upon production of the merchandise, *i.e.*, the opportunity cost of having the merchandise sit in inventory prior to sale, and of extending credit after the sale. To the extent that a company incurs a longer waiting period between production and payment, it will not have recourse to such funds and will generally incur greater financial expenses relative to receiving payment immediately upon production.

Slip Op. 00-17 at 18 n.11, 2000 WL 174986 at \*6.

ratio somehow represent or capture the imputed expenses in the numerator "is without merit". Pls' Rep. at 60.

Ausimont's real bone of contention appears to be the administrative practice of imputing expenses at all. See *Silver Reed America, Inc. v. United States*, 12 CIT 39, 679 F. Supp. 12, *reh'g granted*, 12 CIT 250, 683 F. Supp. 1393 (1988). Since U.S. trade law apparently requires the capture of imputed expenses, 19 U.S.C. § 1677a(d)(1)(B) (1994); cf. *U.S. Steel Group, supra*, 225 F.3d at 1290, cash management may be argument for offsetting imputed expense with imputed income prior to inclusion in the determination of "total U.S. expenses," however that issue is not ripe for consideration in this matter.

#### CONCLUSION

For the foregoing reasons, the matter will be remanded to Commerce for reconsideration of whether the home market sales in Italy of wet reactor head were outside the ordinary course of trade. Commerce's calculation of CEP profit for the subject merchandise is sustained.

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#### [PUBLIC VERSION]

(Slip Op. 01-109)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS CO., GLOBE METALLURGICAL, INC., AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND COMPANHIA BRASILEIRA CARBURETO DE CALCIO, COMPANHIA FERROLIGAS MINAS GERIAS-MINASLIGAS, AND RIMA INDUSTRIAL S/A, DEFENDANT-INTERVENORS

Consolidated Court No. 97-02-00267

[The Department of Commerce's remand determination for the 1994-95 administrative review of silicon metal from Brazil is sustained.]

(Decided August 27, 2001)

*Baker & Botts, LLP* (William D. Kramer, Martin Schaefermeier, and Clifford E. Stevens, Jr.) for Plaintiffs.

*Stuart E. Schiffer*, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Reginald T. Blades, Jr.*), and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*John F. Koeppe*), of counsel, for Defendant.

*Dorsey & Whitney, LLP* (*John B. Rehm, Philippe M. Bruno, and Munford Page Hall, II*) for Defendant-Intervenors.

#### OPINION

MUSGRAVE, *Judge*: In this action, plaintiffs American Silicon Technologies, Elkem Metals Company, Globe Metallurgical, Inc., and SKW

Metals & Alloys, Inc. (collectively "American Silicon") and defendant-intervenors Companhia Brasileira Carbureto de Calcio ("CBCC") and Companhia Ferroligas Minas Gerais-Minasligas ("Minasligas") contest several aspects of the amended final results of the fourth administrative review of the antidumping duty order on silicon metal from Brazil, *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 62 Fed. Reg. 1970 (Jan. 14, 1997) ("Final Results"), issued by the United States Department of Commerce, International Trade Administration ("Commerce" or "the Department"). This Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a) and 28 U.S.C. § 1581(c).

#### BACKGROUND

American Silicon and Minasligas previously filed motions for judgment on the agency record pursuant to CIT Rule 56.2. Based on those motions, the Court remanded the *Final Results* to Commerce for it to address eleven issues. *American Silicon Technologies v. United States*, 23 CIT \_\_\_, Slip Op. 99-34 (Apr. 9, 1999). Commerce issued its remand determination, *Silicon Metal From Brazil; Final Results of Redetermination Pursuant to Court Remand* ("Remand Results"), on September 23, 1999. Presently before the Court are comments submitted by American Silicon, CBCC, and Minasligas contesting the following aspects of the *Remand Results*: (1) Commerce's calculation of CBCC's financial expenses on a consolidated basis with Solvay do Brasil; (2) Commerce's decision not to offset Minasligas's financial expenses with its claimed short-term interest income; and (3) Commerce's inclusion of an amount for monetary correction in Minasligas's financial expenses but not in its financial income. For the reasons which follow, the *Remand Results* are sustained.

#### STANDARD OF REVIEW

The Court shall uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This standard requires "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). However, substantial evidence supporting an agency determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc.*

v. *United States*, 19 CIT 1130, 1132, 899 F. Supp. 632, 635 (1995) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478, 488 (1951)).

#### DISCUSSION

##### I. CONSOLIDATED FINANCIAL EXPENSES

In its prior opinion, the Court ordered Commerce to recalculate CBCC's financial expenses on a consolidated basis with Solvay do Brasil, its immediate parent company, rather than Solvay & Cie, the ultimate parent company of both CBCC and Solvay do Brasil. In reaching this conclusion, the Court found that, contrary to Commerce's interpretation, *Accounting Research Bulletin No. 51, Consolidated Financial Statements* ("ARB 51"), issued by the American Institute of Certified Public Accountants in August 1959, did not establish that majority equity ownership is *prima facie* evidence of corporate control. The Court concluded that the fact that Solvay & Cie owned 100 percent of Solvay do Brasil, which in turn owned 99.9 percent of CBCC, did not establish that Solvay & Cie actually exerted control over CBCC's operations. See *American Silicon Technologies*, Slip Op. 99-34 at 13. Moreover, the Court observed:

Commerce notes that its practice of relying upon the consolidated financial statements of a parent corporation is based upon the fact that the controlling entity, "because of its influential ownership interest, has the power to determine the capital structure of each member company within the group." Def.'s Br. at 35 (quoting *Final Determination of Sales at Less Than Fair Value: New Minivans From Japan*, 57 Fed. Reg. 21,937, 21,946 (1992)). If Commerce's primary concern is control by the parent corporation, then it seems to this Court that the immediate parent corporation, in this case, Solvay do Brasil, would be much more likely to have and exercise direct control over the subsidiary. This Court's impression is supported by record evidence which confirms financial activity between Solvay do Brasil and CBCC. In contrast, "[t]here is no evidence on the record that Solvay & Cie and Solvay do Brasil engage in similar intercompany borrowing \* \* \*. To the contrary, the record demonstrates that Solvay & Cie's financial statements are not reflective of the actual cost incurred by CBCC to produce and sell silicon metal." Pls.' Br. at 35 (emphasis original).

*Id.* at 14. Therefore, the Court held that Commerce's reliance on the consolidated financial statements of Solvay & Cie was not supported by substantial evidence on the record and remanded this aspect of the *Final Results* for recalculation using the consolidated financial statements of CBCC and Solvay do Brasil. *Id.*

CBCC now argues that Commerce gave an incomplete explanation of the law and pertinent facts in defending its use of Solvay & Cie's consoli-

dated financial statements.<sup>1</sup> CBCC contends that ARB 51 was amended by *Statement of Financial Accounting Standard 94* ("SFAS 94"), issued by the Financial Accounting Standards Board in October 1987. "The basic rule established by SFAS 94 is that over 50% ownership signals control, and under the provisions of SFAS 94, full consolidation of financial statements is mandatory unless one of two conditions stipulated therein is met."<sup>2</sup> Defendant-Intervenors' Comments on Department of Commerce's Final Results of Redetermination ("Defendant-Intervenors' Comments") at 4 (citing SFAS ¶ 2). Thus CBCC concludes that U.S. GAAP does in fact "establish that majority ownership is *prima facie* evidence of corporate control." *Id.* at 5.

The Court agrees that U.S. GAAP, as set forth by ARB 51 and SFAS 94, generally provides for use of consolidated financial statements when a parent corporation owns more than 50 percent of a subsidiary. Nevertheless, in light of the purposes of the antidumping statutes, it is appropriate to consolidate CBCC and Solvay do Brasil, as previously ordered. In *AIMCOR v. United States*, 23 CIT \_\_\_, 69 F. Supp. 2d 1345 (1999), the court considered this exact issue. In its analysis the court stated:

Commerce is obligated to rely upon methodologies which "reasonably reflect the costs associated with the production and sale of the merchandise," 19 U.S.C. § 1677b(f) \* \* \*. This court has held that Commerce is to "determine as accurately as possible the true cost to the respondent of manufacturing the subject merchandise." *Timken Co. v. United States*, 18 CIT 1, 10, 852 F. Supp. 1040, 1049 (1994).

*Id.* at 1353-54.<sup>3</sup> Based on the Court's earlier finding that CBCC and Solvay do Brasil engage in intercompany borrowing, but Solvay do Brasil and Solvay & Cie do not, *American Silicon Technologies*, Slip Op. 99-34 at 14, the Court concludes that its original holding was correct and that CBCC's financial expenses should be calculated on a consolidated basis with Solvay do Brasil because this more accurately reflects

<sup>1</sup> Although it was a party to this action, CBCC did not participate in briefing or oral argument on the prior cross-motions for judgment on the agency record. While the Court recognizes that the law of the case doctrine prohibits a court from changing its "decision in a prior appeal in the same case" absent exceptional circumstances, such as clear error in the earlier ruling, see, e.g., *Gould, Inc. v. United States*, 67 F.3d 925, 930 (Fed. Cir. 1995), the Court considers CBCC's argument because it calls into question the analysis of U.S. GAAP in Slip Op. 99-34. Nevertheless, since the Court concludes that its original holding was correct, based on the facts of this case, the applicability of the law of the case doctrine is not an issue.

<sup>2</sup> The two conditions are "when control over the subsidiary is expected to be temporary; or when control does not reside with the majority owner." Defendant-Intervenors' Comments at 4 (citing SFAS ¶¶ 9, 10).

<sup>3</sup> Although not precedential, pursuant to Federal Circuit Rule 47.6, the Court notes that in *E.I. DuPont de Nemours & Co. v. United States*, No. 00-1100, 2001 U.S. App. LEXIS 2188 (Fed. Cir. Feb. 12, 2001), the Federal Circuit concluded that:

An absence of intercompany borrowing within a particular group of companies shows that the group does not treat debt and equity as fungible. Thus, Commerce's reason for using consolidated financial statements does not apply to such groups.

*Id.* at \*9.

the cost incurred by CBCC to produce and sell silicon metal.<sup>4</sup> Therefore, Commerce having followed the Court's instructions, the *Remand Results* are sustained on this issue.

## II. SHORT-TERM INTEREST INCOME

On remand, Commerce asked Minasligas to demonstrate for each of the categories of financial income reported for itself and its parent company Delp Engenharia Mecanica S.A. ("Delp") "that the reported amount of interest income is derived from short-term investments." Supplemental Questionnaire to Minasligas (July 2, 1999), Pub. Record Doc. 2, Fiche 2, Frames 4-6. Commerce's established practice is to deduct only interest income derived from short-term investments of working capital from total financial expenses. See *Remand Results* at 25. In its remand determination, Commerce concluded that Delp's category "interest received from short-term applications of working capital" constituted interest earned from short-term investments.<sup>5</sup> *Remand Results* at 11. Commerce disallowed all other categories of income which Minasligas claimed as interest income from short-term investments related to its operations or Delp's operations. In particular, Commerce disallowed an offset for interest received from Minasligas's certificates of bank deposit because it was "unable to determine whether these certificates are short-term in nature." *Id.* at 13.

Minasligas argues that Commerce erred in disallowing the offset for interest received from bank deposit certificates. On July 21, 1999, Minasligas submitted to Commerce a copy of its ledgers listing the allegedly short-term bank deposit certificates for both Delp and itself. Minasligas contends that the ledgers for the two companies "provide the same basic information, including the maturity date of the bank deposit certificates." Defendant-Intervenors' Comments at 9. Minasligas explains that the final column on the ledgers, which provides the date on which the investment ended, was titled either *resgate* or *vencimento*, and it states that these words are used interchangeably in both Minasligas's and Delp's ledgers. *Id.* at 10. Minasligas admits that the word *vencimento* was not on the translation page accompanying the ledgers, but it explains that this word means "salary, wage; expiration, due date (of a note, debt, \* \* \*)." *Id.* at 9 (citing *Hippocrene, Practical Dictionaries, Portuguese-English English-Portuguese*, First Hippocrene Edition 1987, Second Printing 1989, at 275). Thus Minasligas concludes that the ledgers reflect the maturity date for these investments, and Commerce acted inconsistently by allowing a short-term interest offset for Delp but not for Minasligas based on the same type of information. *Id.* at 10.

<sup>4</sup> CBCC also highlights several facts in the administrative record that "the Department failed to identify for the Court" and which, it claims, "demonstrat[e] Solvay & Cie's control of CBCC." Defendant-Intervenor's Comments at 6. These facts include: Solvay & Cie's indirect ownership of 99.9 percent equity in CBCC; an individual holding senior management positions simultaneously in Solvay & Cie, Solvay do Brasil, and CBCC; and Solvay & Cie's consolidation of CBCC on its 1995 financial statement. *Id.* at 6-7. Solvay & Cie's indirect ownership of CBCC was noted in the Court's prior opinion, see Slip Op. 99-34 at 13 n.5, and none of these facts demonstrate actual control of CBCC's capital structure by Solvay & Cie.

<sup>5</sup> Minasligas stated that "[t]his item is comprised of positive cash flows from the company operations that were invested in bank deposits with a maturity date of less than 12 months." *Remand Results* at 12 (citation omitted).

Minasligas also argues that Commerce's denial of the offset is inconsistent with its conclusions in other administrative reviews. In the 1993-1994 and 1995-1996 administrative reviews of the antidumping duty order on silicon metal from Brazil, Commerce conducted verifications and concluded that Minasligas's bank deposit certificates were, with a few exceptions, short-term investments. See Minasligas's Supplemental Questionnaire Response (July 16, 1999) at Ex. 4, Conf. Record Doc. 3, Fiche 8, Frames 45-50. Moreover, in the administrative review of the antidumping duty order on ferrosilicon from Brazil for 1994-1995, the same years covered by the administrative review at issue in the present action, Commerce also verified that, with a few exceptions, the bank deposit certificates were short-term investments. See Conf. Record Doc. 3, Fiche 8, Frames 43-44. On this basis, Minasligas concludes:

The dates are exactly the same: 1994 and 1995. The information provided and verified by [Commerce] was exactly the same: 1994 and 1995 bank deposit certificates. Accordingly, [Commerce's] position in this remand regarding Minasligas' short-term income from the bank deposit certificates is not supported by the record and flies in the face of the other determinations made by [Commerce] officials after they verified exactly the same 1994 and 1995 information.

Defendant-Intervenors' Comments at 11.

American Silicon argues, to the contrary, that Commerce properly denied Minasligas's claimed deduction for short-term interest income, but erred in granting the deduction for Delp. American Silicon contends that the term *vencimento* appears on a minority of the column headers, while *resgate* appears on the majority. Plaintiffs' Rebuttal Comments on Department of Commerce Final Remand Results at 12-13. Although Minasligas asserts that the terms were used interchangeably, American Silicon notes that *resgate* means "ransom; discharge; redemption," indicating that this was the date the bank deposit certificates were redeemed, but not necessarily when they matured.<sup>6</sup> *Id.* at 13 (citing *Noronha's Legal Dictionary: English-Portuguese, Portuguese-English* 1st ed. 1993 at 465). American Silicon notes that Minasligas had the burden of proving that it was entitled to the deduction for short-term interest income, and since it failed to demonstrate that the income was derived from short-term investments, the deduction was properly denied. See *id.* at 19-20 (citing *NSK Ltd. v. United States*, 19 CIT 1013, 1030, 896 F. Supp. 1263, 1277 (1995)). Moreover, American Silicon argues that, since Minasligas submitted the same type of information in support of the deduction for Delp, as a matter of consistency, this information was insufficient support for Delp's short-term interest deduction.

<sup>6</sup> Minasligas stated that *resgate* means "the date on which the investment was drawn, i.e., terminated," Defendant-Intervenors' Comments at 9, which is consistent with the translation proffered by American Silicon.

The Court finds Commerce's determination supported by substantial evidence on the record. After examining the ledgers, the Court agrees with Commerce that, based on this information, the maturity term of the bank deposits is uncertain. Furthermore, Commerce contends that the verification reports from prior administrative reviews do not prove that all of Minasligas's investments were short-term. See Defendant's Response to the Comments Upon the Final Remand Determination of the Department of Commerce ("Def.'s Resp. Comments") at 6-7. Commerce notes that the verification report for the 1994-1995 review of ferrosilicon from Brazil discusses several instances where long term investments were claimed as short-term. *Id.* at 3, 7. While these discrepancies are relatively minor, Commerce concludes that they cast doubt on the reliability of the short-term interest amounts claimed by Minasligas. *Id.* at 7. Although a reasonable mind could come to the opposite conclusion on this point, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). Moreover, as previously stated, the burden was on Minasligas to demonstrate its entitlement to the deduction for short term interest income. Therefore, the Court sustains Commerce's denial of Minasligas's claimed deduction for income from short-term investments.

Regarding its decision to grant the short-term interest income deduction for Delp, Commerce states that the ledgers were inconclusive in this instance as well, Def.'s Resp. Comments at 6, but the verification reports revealed that Delp's claimed short-term interest income was found to be short-term, without exception, in the other administrative reviews, *Id.* at 3-4. The Court's review of the administrative record confirms Commerce's assertion. Therefore, the Court concludes that Commerce's decision to grant the offset for Delp's "interest received from short-term applications of working capital" is supported by substantial evidence and is therefore sustained.

### III. MONETARY CORRECTION

Minasligas also alleges that Commerce erred in its remand determination by including monetary correction in the financial expenses for Minasligas and Delp, but excluding monetary correction from their financial income. Minasligas asserts that "monetary correction is an adjustment for inflation," and Commerce has previously recognized that under Brazilian GAAP this category is not to be included in financial expense. Defendant-Intervenor's Comments at 12. Therefore, according to Minasligas, including monetary correction in financial expenses but not financial income "arbitrarily inflated Minasligas'[s] financial expense and distorted this company's [cost of production/constructed value calculation]." *Id.*

Commerce states that it

included monetary correction in Minasligas's financial expenses  
\* \* \* because the financial expense information was taken from Mi-

nasligas's audited financial statements. Because this information was subject to audit, Commerce reasonably relied upon its contents. The claimed monetary correction to financial income, however, was not subject to audit or other independent verification. Commerce, therefore, properly required Minasligas to support its claim with record evidence.

Def.'s Resp. Comments at 9-10 (citations omitted). Commerce explains that in response to its requests for "a thorough explanation" of the monetary correction Minasligas merely "(1) stat[ed] that monetary correction is income received from short-term investments, and (2) provid[ed] various figures to represent the value of that claim." *Id.* at 9. Commerce determined that this information was insufficient for it to determine whether the monetary correction was in fact derived from short-term investments, and because its "established practice in calculating net financial expenses is to subtract from total financial expenses only interest income derived from short-term investments of working capital" Commerce denied the offset for monetary correction. *Final Results* at 25.

The Court concludes that Commerce's determination on this issue is supported by substantial evidence. Minasligas once again had the burden of proving its entitlement to the offset to financial expenses, and the Court agrees that it did not provide sufficient evidence to demonstrate that the claimed monetary correction was related to short-term investments. Furthermore, the Court notes that Commerce followed its prior practice in taking financial expense information from audited financial statements. *See Final Results* at 25. Accordingly, the Court sustains Commerce's decision to deny the offset for monetary correction.

#### CONCLUSION

For the foregoing reasons, the Department of Commerce's *Remand Results* are sustained and judgment for Defendant shall be entered in this action.

(Slip Op. 01-115)

GEUM POONG CORP. AND SAM YOUNG SYNTHETICS CO., LTD., PLAINTIFFS v.  
UNITED STATES, DEFENDANT v. E.I. DUPONT DE NEMOURS, INC., ARTEVA  
SPECIALTIES S.A.R.L., D/B/A KOSA, AND WELLMAN, INC., DEFENDANT-  
INTERVENORS

Consolidated Court No. 00-06-00298

[ITA's antidumping duty determination remanded.]

(Dated September 6, 2001)

Sandler, Travis & Rosenberg, P.A. (Philip S. Gallas and Mark R. Ludwikowski) for plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General, David M. Cohen, Director, Velta A. Melnbrensis, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Erin E. Powell), Scott D. McBride, Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

Collier Shannon Scott, PLLC (Paul C. Rosenthal, Kathleen W. Cannon, David C. Smith, Jr., and Grace W. Kim) for defendant-intervenors.

## OPINION

RESTANI, *Judge*: This matter is before the court on motions for judgment based upon the agency record pursuant to USCIT Rule 56.2. The motions have been brought by certain respondents in an antidumping investigation, Geum Poong Corporation and Sam Young Synthetics Co., Ltd. (respectively, "Geum Poong" and "Sam Young"; collectively "Respondents"), and petitioners on behalf of the domestic industry in the antidumping investigation, E.I. DuPont de Nemours, Inc.; Arteva Specialties S.a.r.l., d/b/a KoSa; and Wellman, Inc. (collectively "Petitioners"). The parties challenge aspects of the final affirmative determination of the Department of Commerce ("Commerce") in *Certain Polyester Staple Fiber from the Republic of Korea*, 65 Fed. Reg. 16,880, as amended, 65 Fed. Reg. 33,807 (Dep't Comm. 2000) [*"Final Determination"*]. Respondents and Petitioners both challenge Commerce's calculation of Geum Poong's constructed value ("CV") profit ratio using "facts available" under 19 U.S.C. § 1677b(e)(2)(B)(iii). Respondents also contend that Commerce erred in calculating Sam Young's cost of production ("COP") by relying on reported cost of merchandise ("COM") data that were not co-extensive with the period of investigation ("POI").

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). The court will uphold the Commerce's determination in antidumping investigations unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

## FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 1999, Petitioners filed an antidumping duty petition with Commerce covering certain polyester staple fiber from Korea and Tai-

wan. On April 29, 1999, Commerce initiated antidumping duty investigations against Geum Poong, Sam Young, and Samyang Corporation ("Samyang"). *Certain Polyester Staple Fiber from the Republic of Korea and Taiwan*, 64 Fed. Reg. 23,053 (Dep't Comm. 1999) (init. of investigation). The POI covered April 1, 1998 to March 31, 1999.

On November 8, 1999, Commerce published its preliminary affirmative antidumping duty determination.<sup>1</sup> *Certain Polyester Staple Fiber from the Republic of Korea and Taiwan*, 64 Fed. Reg. 60,776 (Dep't Comm. 1999) (prelim. determ.). Commerce based normal value ("NV") for Geum Poong on constructed value because Geum Poong lacked a viable home market for comparison with sales in the United States.<sup>2</sup> *Id.* at 60,782. Commerce calculated Geum Poong's CV profit and CV selling expenses by taking a weighted average of the selling expenses incurred and profit earned by Samyang and Sam Young.<sup>3</sup> *Id.*

On January 5, 2000, Geum Poong submitted an alternative CV profit calculation methodology using third country data. On January 11, 2000, Commerce rejected the submission as untimely filed, and on the same date, solicited from Respondents and Petitioners additional information regarding the appropriate methodology for calculating Geum Poong's CV profit ratio. In response, Geum Poong submitted certain pages from a Bank of Korea ("BOK") publication entitled "Financial Statement Analysis for 1998" that included the country-wide profit ratio for the Korean man-made fibers industry. *See Geum Poong Letter to Commerce* (Feb. 8, 2000), at Exh. A, P.R. Doc. 258, Respondents' App., Tab 9, at Exh. A.

On March 30, 2000, Commerce published its final affirmative antidumping duty determination. *See Final Determination*, 65 Fed. Reg. 16,880. In the final determination, Commerce calculated Geum Poong's CV profit by taking a simple average of the BOK profit data and the figure for the weighted average profit ratios of Samyang and Sam Young. Commerce arrived at the following dumping margins: 0.14% for Samyang (*de minimis*); 7.96 Sam Young; and 14.10% for Geum Poong.

<sup>1</sup> Commerce assigned Samyang, Sam Young, and Geum Poong preliminary dumping margins of 3.51, 6.33, and 26.39 percent, respectively.

<sup>2</sup> Commerce calculates constructed value based on the sum of the following: cost of materials and fabrication for the foreign like product; selling, general and administrative (SG&A) expenses; profit; and U.S. packing costs. 19 U.S.C. § 1677b(e).

<sup>3</sup> Where actual data are not available to determine CV profit under 19 U.S.C. § 1677b(e)(2)(A), section 1677b(e)(2)(B) provides three alternatives:

(i) [Alternative One] the actual amounts incurred and realized by the specific exporter or producer \* \* \* for profits, in connection with the production and sale, for consuming in the foreign country, of merchandise that is in the same general category of products as the subject merchandise;

(ii) [Alternative Two] the weighted-average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) \* \* \* for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country; or

(iii) [Alternative Three] \* \* \* any other reasonable method except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise [.]

## DISCUSSION

*I. Calculation of CV Profit for Geum Poong**A. Selection of Alternative Three*

Petitioners contend that Commerce erred in calculating Geum Poong's CV profit under Alternative Three on the ground that verified profit data for Sam Young and Samyang were available, thereby requiring calculation under Alternative Two and obviating the need to factor in the BOK profit data.<sup>4</sup> Petitioners' argument lacks merit for two reasons.

First, Petitioners' argument rests on the faulty assumption that Commerce may resort to Alternative Three only when data are unavailable to calculate CV profit under the other two Alternatives. The three Alternatives are not hierarchical. *See Statement of Administrative Action*, accompanying H.R. Rep. No. 103-826(I), at 840 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4176 (1994) [hereinafter "SAA"]. Petitioners quote language from the SAA purportedly limiting the selection of Alternative Three to cases where "no other data are available." Petitioners seem to equate the selection of Alternative Three with a decision to resort to "facts available." The language quoted clearly describes the circumstance under which Commerce may calculate CV profit under Alternative Three *without applying the profit cap*, that is, under "facts available":

The Administration \* \* \* recognizes that where, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a "profit cap" under alternative (3), it might have to apply alternative (3) on the basis of "the facts available." This ensures that Commerce can use alternative (3) when it cannot calculate the profit normally realized by other companies on sales of the same general category of products.

SAA at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4177.

Second, Commerce did not state, as Petitioners assert, that it lacked profit data for Samyang and Sam Young; rather, it explained that it could not use Alternative Two under the following reasoning:

Samyang is the only respondent with viable home market sales (19 C.F.R. § 351.405(b)(2) requires a profit ratio under the alternative be based on home market sales). If we were to use Samyang's profit ratio exclusively under this alternative, Geum Poong would be able

<sup>4</sup> The SAA specifies that "Commerce will explain the basis for the selection of a particular methodology [of calculating CV profit] in a given case." SAA at 840, *reprinted in* 1994 U.S.C.C.A.N. at 4176. Commerce explained why Geum Poong's CV profit could not be calculated under § 1667b(e)(2)(A) (subject merchandise actual data for the specific exporter) or under Alternative One (general product category data for specific exporter). Neither of these findings are in dispute.

to determine Samyang's proprietary profit rate [in violation of 19 C.F.R. 351.306(a)].<sup>5</sup>

*Issues & Decision Mem. to Final Determination*, 65 Fed. Reg. 16,880, at cmt. 15. [hereinafter "*Issues Mem.*"]. Commerce is correct that Alternative Two cannot be based on home market sales in this case. Alternative Two is limited to profits incurred and realized "in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(B)(ii). The regulations specify that under 19 U.S.C. § 1677b(e)(2)(B), "foreign country" generally means "the country in which the merchandise is produced." 19 C.F.R. 351.405(b).<sup>6</sup> A regulation promulgated by an agency with rule-making authority in a particular area and reasonably interpreting an ambiguous statute, such as Alternative Two, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). See *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999). Commerce thus appropriately concluded that any calculation under Alternative Two would be based solely on Samyang's sales data. Because calculating CV profit under Alternative Two, without the Sam Young data, would result in a CV profit ratio that impermissibly revealed Samyang's proprietary profit ratio, Commerce properly determined that Alternative Two was unavailable.

#### B. Calculation of CV Profit under Alternative Three

To calculate Geum Poong's CV profit, Commerce took a simple average of the BOK data, which may include U.S. sales data, with the figure for the weighted-average profit rates of Samyang and Sam Young. Petitioners contend that under Alternative Three, Commerce is prohibited from relying on profit data derived from non-home market sales and thus erred in factoring the BOK data into its calculation. Commerce responds that it is not barred from relying on non-home market sales data to determine CV profit based on "facts available."

Respondents, on the other hand, challenge Commerce's calculation on the following grounds: (1) Commerce committed ministerial error because the BOK data already included Samyang's profit rate; and (2) Commerce erred in not applying the BOK data as a "profit cap." Commerce responds that (1) its calculation constituted a methodological choice; and (2) it need not have applied the BOK data to determine a

<sup>5</sup> 19 C.F.R. § 351.306 provides, in relevant part, as follows:

*Use of business proprietary information.*

(a) By the Secretary. The Secretary may disclose business proprietary information submitted to the Secretary only to:

- (1) An authorized applicant;
- (2) An employee of the Department of Commerce or the International Trade Commission directly involved in the proceeding in which the information is submitted;
- (3) An employee of the Customs Service directly involved in conducting a fraud investigation relating to an antidumping or countervailing duty proceeding;
- (4) The U.S. Trade Representative as provided by 19 U.S.C. 3571(i);
- (5) Any person to whom the submitting person specifically authorizes disclosure in writing; and
- (6) A charged party or counsel for the charged party under 19 C.F.R. part 354.

<sup>6</sup> In contrast, under 19 U.S.C. § 1677b(e)(2)(A), "foreign country" means the country in which the merchandise is produced or a third country selected by the Secretary under 19 C.F.R. § 351.404(e), as appropriate. 19 C.F.R. § 351.405(b).

profit cap because the statute specifies that the profit cap is to be derived from home market sales only.<sup>7</sup>

### 1. Calculation under Facts Available

The statute provides that under Alternative Three, Commerce may calculate CV profit by "any \* \* \* reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise[.]" 19 U.S.C. § 1677b(e)(2)(B)(iii) (emphasis added). Petitioners assert that the language following the parenthetical refers back to "any reasonable method," and thus the phrase "for consumption in the foreign country" limits Commerce to data based on home market sales, given the definition of "foreign country" in the regulations. Because the BOK data may be based in part on nonhome market sales, Petitioners assert, Commerce may not rely on it.<sup>8</sup>

Petitioners' reading of the statute is incorrect. The portion of Alternative Three emphasized above is referred to as the "profit cap." See, e.g., *Floral Trade Council v. United States*, 41 F. Supp. 2d 319, 326-27 (Ct. Int'l Trade 1999). The SAA clarifies that the homemarket limitation does not apply generally to "any reasonable method" provided for under Alternative Three, but to the profit cap ordinarily placed thereon: "[Commerce may calculate CV profit by] any other reasonable method, provided that the amount for profit does not exceed the profit normally realized by other companies on home market sales of the same general category of products (the so-called profit cap)." SAA at 840, reprinted in 1994 U.S.C.C.A.N. at 4176 (emphasis added). Otherwise, a case may arise in which Commerce would have no means of calculating CV profit, a scenario that clearly could not have been intended by the drafters of the statute.

Petitioners attempt to find support for its reading by pointing to the Department's preamble to the final regulations: "the proposed average industry-wide profit figure presumably would include sales by all exporters and producers in all markets, including sales by the exporter and producer in question and sales to the United States. In our view, the statute prohibits the use of such sales for this purpose." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,360 (Dep't

<sup>7</sup> Commerce also argues that in failing to raise the "profit cap" issue below, Respondents have not exhausted their administrative remedies. The court finds, however, that Respondents raised the issue at the administrative level. See, e.g., *Sam Young and Geum Poong Case Brief* (Feb. 22, 2000) at 27 n.46 and 29 n.51, C.R. Doc. 355, DOC App., Tab 5, at 4 n.46 and 6 n.51.

<sup>8</sup> DuPont cites *Shop Towels from Bangladesh*, 61 Fed. Reg. 55,957, 55,959 (Dep't Comm. 1996) (final admin. rev.), for the proposition that Commerce may not rely on data that includes U.S. sales. There, Commerce preliminarily calculated CV profit under Alternative Three using "facts available" based solely on U.S. sales. Commerce stated, "We agree with the respondents that it is inappropriate to calculate profit for addition to CV based on the respondents' U.S. sales. The statute is clear that we must derive profit on the basis of home market or third-country sales." *Id.* Commerce therefore changed its profit calculation by relying on actual profits data derived from financial statements of three exporters in the same general category. Commerce in *Shop Towels from Bangladesh* did not address the present scenario: reliance on data that includes home-market and non-home market sales, but it does stand for the proposition that even in applying "facts available," Commerce complies with the otherwise applicable statutory provisions, to the extent possible.

Comm. 1997) (final rule). Petitioners take the language of the preamble and the language of Alternative Three with respect to "the foreign country" out of context. It is clear that this limitation refers to the "profit cap," and not to "any other reasonable method."<sup>9</sup>

Thus, Commerce in calculating CV profit under a facts available methodology that employs Alternative Three without the profit cap may rely on any data available to it, which may include some non-home market sales data, provided its method is reasonable and it provides an adequate explanation thereof.

## 2. Geum Poong's CV Selling Expenses

To further bolster their claim, Petitioners allege an inconsistency between Commerce's calculation of CV profit and CV selling expenses. In contrast to Commerce's calculation for CV profit, the calculation for CV selling expenses did not include the BOK data. Petitioners argue that use of Samyang and Sam Young's weighted average to calculate sales expenses under Alternative Two is inconsistent with Commerce's justification for not applying Alternative Two to calculate Geum Poong's CV profit. Petitioners claim that the concern of revealing Samyang's proprietary data to Geum Poong is still present in the calculation of selling expenses under Alternative Two.<sup>10</sup>

Petitioners incorrectly assume that Commerce calculated CV selling expenses under Alternative Two. In the *Preliminary Determination*, Commerce specifically indicated that it calculated Geum Poong's selling expenses under Alternative Three. *Preliminary Determination*, 64 Fed. Reg. at 60,782. Commerce then indicated that it "calculated weighted average amounts for selling expenses \* \* \* based on the selling expenses incurred \* \* \* by Samyang and Sam Young in their respective comparison markets on sales in the ordinary course of trade." *Id.* Commerce did not change its method of calculating selling expenses for the purposes of the *Final Determination*. See *Final Determination*, 65 Fed. Reg. at 16,881. Thus, Commerce properly calculated selling expenses according to "any reasonable method" without limitation as to whether the underlying data had been derived from home market or non-home market sales.<sup>11</sup>

<sup>9</sup> Petitioners' reliance on *Floral Trade Council*, 41 F. Supp. 2d at 327, is misplaced. The court in *Floral Trade Council* stated that

[U]nlike the preferred methodology and alternative (ii), however, alternatives (i) and (iii) do not require the amount for profit to be calculated based on home country sales of a foreign like product in the ordinary course of trade. See 19 U.S.C. §§ 1677b(e)(2)(B)(i) & (iii). Instead, alternatives (i) and (iii) simply require that the calculation for profit be based on home country sales of "merchandise in the same general category of products as the subject merchandise."

*Id.* The court was discussing the ordinary course of trade requirement and not the meaning or placement of the words "the foreign country."

<sup>10</sup> Alternative Two contains "the foreign country" limiting language for the base calculation. Thus, as with the profit cap, home country sales data are to be used. Although Samyang's sales expense information derived from home-market sales, data for Sam Young included sales in its largest third-country market, Canada. Thus, calculation of Geum Poong's CV selling expenses under Alternative Two would rely solely on data for Samyang, thereby impermissibly revealing its proprietary information to Geum Poong.

<sup>11</sup> The parties point to nothing in the statute or applicable regulation that requires Commerce to use the same set of data or sources for calculating selling expenses and profit. In previous determinations, Commerce has based its calculations on different sets of data. See, e.g., *Certain Fresh Cut Flowers from Colombia*, 63 Fed. Reg. 31,724, 31,731 (Dep't Comm. 1998) (final admin. rev.) (basing selling expenses on respondent's home market sales while basing profit on financial statements from a producer of the same general category of goods).

### 3. Ministerial Error

Respondents allege that Commerce abused its discretion in refusing to correct a ministerial error of "duplication" where Commerce had "double-counted" Samyang's profit data. Respondents maintain that Commerce accounted for Samyang's profit first as a component of the BOK data (which included data on public audited companies such as Samyang), and then again by using the CV weighted-average profit rate calculated based on Samyang's and Sam Young's reported comparison market sales. Geum Poong misconstrues the meaning of "ministerial error." The regulation defines "ministerial error" as "[1] an error in addition, subtraction, or other arithmetic function, [2] clerical error resulting from inaccurate copying, duplication, or the like, and [3] any other similar type of unintentional error which the Secretary considers ministerial." 19 C.F.R. § 351.224(f). The term "duplication" falls within the general category of "clerical error," and the third clause makes clear that intentional choices by Commerce fall outside the purview of the regulation.

In this case, Commerce clearly made a methodological decision based on facts available, rather than an inadvertent clerical error. In a letter responding to Geum Poong's letter alleging ministerial error, *Letter from Sandler, Travis & Rosenberg, P.A. to Secretary of Commerce* (Apr. 5, 2000), P.R. Doc. 303, Respondents' App., Tab 17, Commerce explained its decision as follows:

As Geum Poong does not dispute, the Department intentionally used a simple average of the BOK profit rate and the profit rates of Samyang and Sam Young to derive Geum Poong's profit. At the final determination, because we did not know which companies were included in the BOK data or the relative size of their sales[,] we were unable to calculate a weighted average profit rate or to make respondent-specific adjustments to the BOK data and, thus, we used a simple average as facts available.

*Clerical Error Allegations* (Apr. 26, 2000), at 4, P.R. Doc. 311, Respondents' App., Tab 18, at 4. Commerce thus indicated its preferred method if the BOK data had been available in a suitably disaggregated form, and stated that as a substitute it was relying on a simple average based on the information in the record. Commerce did not mistakenly input the same set of data twice or overlook data relied upon in a standard methodology, the types of errors contemplated in the regulation. Cf. *Fabrique de Fer de Charleroi, S.A. v. United States*, No. 99-04-00219, slip op. 01-68, at 24-26 (Ct. Int'l Trade June 6, 2001) (finding error to be ministerial where Commerce failed to include grants within calculation of subsidies, contrary to intended methodology). Thus, there is no ministerial error. This is not to say, however, that Commerce met its burden of explaining its methodology or that its methodology is necessarily reasonable.

#### 4. Profit cap

Respondents assert that Commerce erred in resorting to "facts available" because the BOK data provided the profit cap amount "normally realized by exporters or producers" as required in Alternative Three, and were "publicly available, credible and self-verifying" as required by Commerce's January 11, 2000 request for additional information.<sup>12</sup> Commerce responds that the BOK data cannot serve to measure the profit cap, not because the reliability of the data is suspect, but because the profit cap must be based on home market sales.

Because Commerce is correct that under the statute it is inappropriate to derive the profit cap from non-home market sales figures, *see supra*, Commerce is not required to rely on the undifferentiated BOK data for this purpose, if it has another rational approach available. Nevertheless, Commerce failed to meet its burden of fully explaining in the final determination its reasons for resorting to "facts available" or for its facts available selections. After giving its reasons for calculating Geum Poong's CV profit under Alternative Three, Commerce cited the "profit cap" language therein. Without explaining why it was unable to calculate the profit cap in this case, Commerce stated:

We have based the profit amount for Geum Poong on facts available under section 776(a)(1) of the Act. Lacking any other information to determine an appropriate profit rate for Geum Poong, we find that a simple average of the BOK profit rate, and the profit rates of Samyang and Sam Young is a reasonable methodology for estimating the profit experience of producers in the same general category of merchandise.

*Issues Mem.*, at cmt. 15.

Commerce bears a burden of explaining its method if it chooses to calculate CV profit under Alternative Three. The SAA specifies that "[i]f [Alternative Three] is selected, Commerce will provide to interested parties a description of the method chosen and an explanation of why it was selected." SAA at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4176 (emphasis added). If Commerce must explain itself when it follows Alternative Three, inherently, a clear explanation is required if Commerce dispenses altogether with the profit cap limitation contained in Alternative Three.<sup>13</sup> Commerce does not explain whether any other data were available to calculate the profit cap.<sup>14</sup> Nor does Commerce explain why the BOK data do not provide an adequate facts available profit cap. If Alternative Three without the profit cap may be used as "facts avail-

<sup>12</sup> Commerce requested "any publicly available information establishing alternative CV profit ratios for Geum Poong." *Letter from Susan H. Kubbach* (Jan 11, 2000), P.R. Doc. 247, Respondents' App., Tab 8. Commerce indicated that "[a]ny information submitted must be credible and self-verifying, e.g., audited financial statements of Korean firms that produce merchandise in the same general category as subject merchandise." *Id.*

<sup>13</sup> Commerce states in its brief that "[i]n exercising its discretion, Commerce reasonably determined that the BOK data did not adequately represent \* \* \* an industry standard [to determine the applicable profit cap]." DOC Br. Opp. Geum Poong, at 15. Nowhere in the *Final Determination* is there such a discussion.

<sup>14</sup> In response to Commerce's January 11, 2000 request for additional information, Geum Poong submitted audited financial statements for Samyang, Saehan Industries, Inc., and SK Chemicals Co., Ltd. *See Geum Poong Letter to Commerce*, at Exhs. B-D, P.R. Doc. 258. From these statements, Geum Poong calculated the following profit ratios: 0.67% for Samyang, 1.2% for Saehan, and 1.9% for SK Chemicals. *See id.* at 6-7 & nn.2-4. Commerce made no mention of the existence of the financial statements, or of the accuracy of Geum Poong's calculations.

able," it would seem a "facts available" profit cap may also be used. The SAA, while approving Commerce's "no profit cap" methodology for cases where no cap data is available at all, *see supra* pp. 5-6, provides no guidance in the case of a technically deficient cap. Thus, Commerce is free to employ a reasonable approach. Commerce must explain why it chose one methodology over another. Because the statute mandates the application of a profit cap, Commerce cannot sidestep the requirement without giving adequate explanation even in a facts available scenario. Such an omission prevents any meaningful review of Commerce's determination.

#### 5. Reasonableness of Commerce's Method

Even assuming the profit cap need not be applied in this case, Commerce failed to explain adequately the reasonableness of its methodology. Commerce's explanation of its methodology is as follows:

This methodology not only takes into account the profit rates of Samyang and Sam Young, which compromise a substantial portion of the industry, but also includes, within the BOK rate, rates for other PSF producers such as Saehan Industries and SK Chemicals on the same general category of products.

*Issues Mem.*, at cmt. 15. First, in Commerce's brief, the agency acknowledges that "the use of the BOK and Samyang data might have led to the indirect use of the same information twice in the profit calculation." DOC Br. Opp. Geum Poong, at 25. Even if the information from the BOK Financial Statement Analysis in the form made available to Commerce did not disaggregate the data by company, Commerce cannot ignore the high likelihood that Samyang and/or Sam Young were included therein, and if they are a substantial portion of the industry, that the BOK rate may not actually represent "other" producers. The probability of double-counting and whether such double-counting would or would not skew the results were not accounted for in Commerce's explanation. Second, Commerce does not explain why it is reasonable to take a simple average of company-specific data with industry-wide data when the former is limited to one product-type and the latter includes all man-made fibers. None of the previous determinations cited by Commerce have utilized such a methodology. Third, Commerce's justification for using the BOK data (i.e., that it includes data for Saehan Industries and SK Chemicals) is inconsistent with its contention that it was unaware of which companies were included in the BOK data.

Dumping margins are to be determined "as accurately as possible." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (citation omitted). If Commerce, based on substantial evidence, found the use of a weighted average of Samyang and Sam Young data an unrepresentative approximation of Geum Poong's profit, it was within its discretion to seek more information from the parties or to rely on other information it possessed. That Commerce may need to rely on facts available does not translate to the inherent reasonableness of the method used.

## II. Calculation of Production Costs for Sam Young

In its questionnaire response, Sam Young indicated that in order to calculate cost of production to cover the full POI (i.e., April 1, 1998 to March 31, 1999), it took costs from its 1998 financial statement (January through December 1998, Sam Young's fiscal year), excluded the first three months of 1998, and added the first three months of extracted 1999 data. See *Sam Young Section D Questionnaire Response* (Sept. 9, 1999), at 17-18, P. R. Doc. 164.

Respondents' App., Tab 12, at 17-18. Respondents claim that in calculating Sam Young's production costs, Commerce erred by finding Sam Young's reported costs were understated and relying on figures from Sam Young's 1998 financial statement rather than the POI-based figures provided by Sam Young. *Issues Mem.*, at cmt. 13. Respondents contend that the POI-based figures were verified and Sam Young was never afforded the opportunity to correct any potential deficiencies. The court finds that Commerce acted within its discretion in relying on Sam Young's fiscal year cost data as facts available.<sup>15</sup>

Commerce has the authority to use facts available in making its determination "if \* \* \* necessary information is not available on the record." 19 U.S.C. § 1677e(a)(1). In Commerce's February 15, 2000 verification report for Sam Young, Commerce noted—and Respondents do not deny—that Sam Young did not keep an inventory ledger of raw materials, thereby precluding Commerce from determining raw material consumption concurrent with the POI.<sup>16</sup> *Sam Young Verification Report*, at II-3, Respondents' App., Tab 13, at 17. Sam Young's methodology rested on the apparently flawed assumption that purchases were equal to consumption during the first quarters of 1998 and 1999.<sup>17</sup> *Issues Mem.*, at cmt. 13. Accordingly, Commerce reasoned as follows:

[W]e do not believe that the reported costs reasonably reflect and accurately capture all of the actual costs incurred in producing the subject merchandise, especially with regard to the first quarter of 1999. For this period, **the amounts produced could not have been achieved with the inputs that were purchased in that period.** \* \* \* [I]n making our final determination, we have used Sam Young's 1998 fiscal year costs of manufacture data as non adverse facts available for calculating Sam Young's cost of production because Sam Young's records do not allow for an accurate calculation of its POI costs.

<sup>15</sup> Relying on *Mannesmannrohren-Werke AG v. United States*, 77 F. Supp. 2d 1302, 1313-14 (Ct. Int'l Trade 1999), Respondents assert that Commerce's finding is not supported by substantial evidence because it failed to explain why Sam Young has failed to act to the best of its ability. Such reliance is misplaced where Commerce in this case did not decide to apply adverse facts available, but relied on the only reliable data available, given Sam Young's accounting practices.

<sup>16</sup> Sam Young officials stated at verification that Sam Young's direct material costs mostly consist of the raw material costs for polyester waste. *Sales and Cost Verification of Sam Young* (Feb. 15, 2000), P. R. Doc. 260, at II-3, Respondents' App., Tab 13, at 17 ("Verification Report").

<sup>17</sup> Sam Young subtracted its first quarter 1998 raw materials purchases from its fiscal year 1998 raw materials consumption and added its first quarter 1999 purchases to arrive at total reported costs. See *Issues Mem.*, at cmt. 13 (citing *Verification Report* at II-2 and II-3).

*Id.* (emphasis added). Respondents have not offered evidence that would controvert Commerce's conclusion that the input purchases Sam Young reported did not correspond to production totals.

Nor is there support for Respondents' contention that Sam Young was not on notice of the discrepancy. In the *Preliminary Determination Calculations for Sam Young* (Oct. 29, 1999), at 2, P.R. Doc. 216, DOC App., Tab 3, at 2, Commerce took note that the average cost of manufacturing ("COM") for the POI is approximately 30% less than a COM based on Sam Young's financial statement (January-December 1998). Commerce also noted Sam Young's contention that because the first three months of its 1998 financial statements came at the tail end of the Korean foreign exchange crisis, its costs were higher in this period than in the corresponding period in 1999. Commerce determined, however, that Sam Young's explanation "only partially accounts" for the discrepancy noted by petitioners. *Id.* at 2-3, DOC App., Tab 3, at 2-3. For the purposes of the preliminary determination, Commerce revised the reported per unit total materials costs to account for what it deemed an apparent discrepancy in the total production quantity used by Sam Young to calculate its per-unit costs. See *Preliminary Determination*, 64 Fed. Reg. at 60,781.

Respondents assert that at verification Commerce "confirmed and accepted" Sam Young's cost reporting methodology. Respondents' Brief at 33. Respondents wrongly imply that Commerce's verification of Sam Young's underlying cost data is tantamount to approval of Sam Young's methodology. This is not the case. Commerce, as a preliminary matter, merely described Sam Young's methodology without passing on its reliability. The verification report states in relevant part:

In order to report the material costs for the POI, officials explained that they added the total materials purchased from January through March 31, 1999 to the total costs for 1998. The total materials purchased from January through March 31, 1998 were then subtracted to get the total costs for the POI. \* \* \* Company officials explained that total production quantity was based on inventory ledger entries of finished products. Company officials provided worksheets showing the total monthly production quantities of PSF from February 1998 through May 1999. \* \* \* We selected total monthly production quantities of siliconized PSF and tied the quantities to the inventory ledger and to the reported amount \* \* \*. We noted no discrepancies."

*Verification Report*, at II-2 to II-3, Respondents' App., Tab 13, at 16-17. The notation of "no discrepancies" refers to the verification of reported production quantities in comparison with the corresponding amounts in the inventory ledger. The verification report makes no mention of the nexus between the production quantities and cost of inputs actually consumed.

Thus, because necessary information was unobtainable due to Sam Young's accounting practices, Commerce properly relied on non-adverse facts available.

## CONCLUSION

Accordingly, the Final Determination is remanded for the purpose of reconsidering Geum Poong's CV profit calculation. Commerce's determinations with respect to Sam Young's Cost of Manufacturing and Geum Poong's CV selling expenses are sustained.

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(Slip Op. 01-116)

ALTX, INC., AMERICAN EXTRUDED PRODUCTS, CORP., DMV STAINLESS USA, INC., SALEM TUBE, INC., SANDVIK STEEL CO., PENNSYLVANIA EXTRUDED TUBE CO., AND UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, PLAINTIFFS *v.* UNITED STATES, AND UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND SUMITOMO METAL INDUSTRIES, NIPPON STEEL CORP., KAWASAKI STEEL CORP., NKK CORP., KOBE STEEL LTD., AND SANYO SPECIAL STEEL CO., DEFENDANT-INTERVENORS

Court No. 00-09-00477

[ITC material injury determination remanded.]

(Dated September 19, 2001)

*Collier Shannon Scott, PLLC (David A. Hartquist, Jeffrey S. Beckington, and R. Alan Luberd)* for plaintiffs.

*Lyn M. Schlitt, General Counsel, Marc A. Bernstein, Assistant General Counsel, United States International Trade Commission (Rhonda M. Hughes),* for defendants.

*Wilmer, Cutler & Pickering (John D. Greenwald, Leonard Shambon, and Lynn M. Fischer)* for defendant-intervenors.

## OPINION

RESTANI, *Judge*: Plaintiffs Altx, Inc., American Extruded Products Corp., DMV Stainless USA, Inc., Salem Tube, Inc., Sandvik Steel Co., Pennsylvania Extruded Tube Company, and United Steelworkers of America, AFL-CIO/CLC (collectively "Altx") appear before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging the final negative injury and threat determinations of the United States International Trade Commission ("ITC" or "Commission") in *Circular Seamless Stainless Steel Hollow Products from Japan*, Inv. No. 731-TA-859 (Final), USITC Pub. 3344 (Aug. 2000).<sup>1</sup>

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations which are "un-

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<sup>1</sup> Of the six commissioners who participated in the decision, four found no material injury by reason of dumped imports. Chairman Koplan and Vice Chairman Okun dissented. See *Circular Seamless Stainless Steel Hollow Products from Japan*, USITC Pub. 3344, at 1 n.2.

supported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

#### DISCUSSION

The ITC's material injury analysis requires an evaluation of (1) the volume of subject imports, (2) the effect of such imports on prices for the domestic like product in the United States, and (3) the impact of such imports on U.S. producers of the domestic like product. 19 U.S.C. § 1677(7)(B)(i). Only after the consideration and explanation of all three factors may the Commission arrive at a final determination. See *Angus Chem. Co. v. United States*, 140 F.3d 1478, 1484-85 (Fed. Cir. 1998).

#### I. Volume

The statute directs the Commission to "consider whether the volume of imports of the [subject] merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). The ITC concluded that subject import volume was not "significant" during the period of investigation ("POI"), "notwithstanding the increases in subject import volume and market penetration from 1997 to 1998." *Circular Seamless Stainless Steel Hollow Products from Japan: Views of the Commission* (Sept. 5, 2000), ITC App., C.R. Doc. 212, at 17 [hereinafter "*Final Determination*"]. The Commission identified the following four observations in support of its volume conclusion: (1) Subject import volumes actually declined during the period when the domestic industry performed poorly; (2) The "consistent" and "substantial" drop of subject import volume was not, as plaintiffs argue, in reaction to the filing of the petition; (3) Nonsubject imports may have played a significant role in the market, displacing domestic like products; and (4) Competition between subject imports and the domestic like product was somewhat attenuated. *Id.* at 15-17.

#### A. Correlation between import volumes and performance of the domestic industry

Although it acknowledged that subject import volumes almost doubled between 1997 and 1998, the Commission found that subject import volumes "then declined consistently and substantially thereafter."<sup>2</sup> *Id.* at 16-17. Also noted in the *Final Determination* are declines in both subject import market share and value between 1998 and 1999. *Id.* at 15. Emphasizing these downward indicators in the latter part of the POI, the Commission concluded that there could be no correlation between subject imports and the condition of the domestic industry, which actually weakened when subject import volumes declined in 1999. *Id.* at 17.

Plaintiffs contest this conclusion regarding correlation with the state of the domestic industry. First, although the domestic industry per-

<sup>2</sup> The quantity of subject import volume rose from 1 | short tons in 1997 to 1 | short tons in 1998; the following year, volume fell to 1 | short tons. *Final Determination*, at 15 n.68.

formed favorably during the first part of the POI, at a time when subject import volumes increased significantly, Plaintiffs insist that the domestic industry's performance was directly attributable to | | by domestic producers. Pl.'s Reply Br., at 2-3. Controlling for | |, Plaintiffs argue, reveals a weakening domestic industry between 1997 and 1998.<sup>3</sup> Second, Plaintiffs acknowledge that in 1999, the domestic industry, including exports, experienced a marked decline. Plaintiffs argue, however, that in a market with shrinking consumption, merchandise is consumed more slowly as stocks last longer. Consequently, increased purchases of subject import merchandise in 1997 and 1998 may have been consumed into the next year, thus harming the domestic industry only in 1999, as the data demonstrates. Pl.'s Reply Br., at 5 n.1.<sup>4</sup> Finally, Plaintiffs point to the Commission's own econometric analysis, in which the ITC staff concluded that subject imports result in a 7.2% to 16.1% reduction in output in the domestic industry. *Staff Report* (Aug. 3, 2000), ITC App., C.R. Doc. 208, at F-3, cited in Pl.'s Initial Br., at 23-24.

In the Final Determination, the ITC does not explain how the decline of subject imports between 1998 and 1999 is dispositive of the significance of subject import volumes in light of Plaintiffs' arguments combined with its own econometric analysis. The statute directs the Commission to

include in a final determination of injury an explanation of the basis for its determination that *addresses relevant arguments that are made by interested parties* who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise.

19 U.S.C. § 1677f(i)(3)(B) (emphasis added). Thorough consideration of such arguments and analyses is also an integral element of the Commission's responsibility to "examine the relevant data and articulate a satisfactory explanation for its action \* \* \*." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Cf. *United States v. Nova Scotia Food Prods.*, 568 F.2d 240, 252 (2d Cir. 1977) ("It is not in keeping with the rational [agency] process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered."). The Final Determination merely cites to record evidence containing data on subject import indicators throughout the POI.<sup>5</sup> This off-handed reference to annual data cannot, by itself, constitute an acknowledgment of Plaintiffs' arguments, much less a reasoned explana-

<sup>3</sup> Plaintiffs cite | | in support of their characterization of the domestic industry.

<sup>4</sup> The ITC has not filed confidential versions of the petitioners' submissions below. Because defendant did not claim failure to exhaust remedies, the court assumes that these specific arguments are contained in the confidential filings. Because the important arguments as to the econometric analysis are clearly raised, see *Petitioners' Final Comments* (Aug. 15, 2000), at 13, P.R. Doc. 94, the court would require remand in any case.

<sup>5</sup> In its brief, the ITC concedes that the subject import volumes were indeed higher in 1999 than 1997 levels, but nevertheless advances various arguments in support of the conclusions in the Final Determination. The brief fails, however, to refer to any section of the Final Determination where one finds a similar explanation. See ITC Br., at 12-13. The court restricts its review to matters found in the Final Determination and therefore does not consider such *post hoc* rationales for an agency's decision. See *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No. 99-07-00446, Slip Op. 01-101, at 9-10 (Ct. Int'l Trade Aug. 14, 2001).

tion for discounting them, as the statute requires.<sup>6</sup> See *Bethlehem Steel Corp. v. United States*, 140 F. Supp. 2d 1354, 1364 (Ct. Int'l Trade 2001). Furthermore, whatever discretion the Commission may have to reject deliberately the conclusions found in the agency's Staff Report, *Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1058-59 (1995), it may not through its silence simply ignore a Staff Report analysis that contradicts the Commission's own conclusions where an interested party has specifically brought the possibly conflicting evidence to the agency's attention.<sup>7</sup> Therefore, the court cannot, without more, sustain the Commission's conclusions regarding the correlation between subject import volumes and the health of the domestic industry, as the Final Determination lacks needed explanation.

*B. Declining volumes as a response to the filing of the antidumping petition*

If the Commission finds that a change in the volume, price effects, or impact of subject imports since the filing of the petition is related to the pendency of the investigation, it may reduce the weight accorded to the relevant data. 19 U.S.C. § 1677(7)(I). Plaintiffs assert that rumors of an imminent antidumping petition, circulating in early 1999, could have affected purchasing and production of subject merchandise. In response, the Commission stipulated that "[e]ven if respondents were aware a few months into 1999, we do not find it credible that the drop in imports in the first half of 1999 can be attributed to such knowledge \* \* \*." *Final Determination*, at 16 n.75. The Commission reasoned that because of the 13-26 week lag period between the purchaser's placement of the order and the arrival of the imports, any drop in volume measured during the asserted period of awareness, must have been initiated by a drop in orders placed 13-26 weeks earlier, long before rumors may have existed. Accordingly, the Commission concluded that any pre-filing awareness of the petition did not affect the volume of subject imports.

<sup>6</sup>The statutory requirement that the agency properly respond in the Final Determination to all relevant arguments raised by interested parties is especially clear when one compares 19 U.S.C. § 1677f(3)(B) (1994) with the statute existing before the Uruguay Round Agreements Act ("URAA"), which provided only that the ITC

shall notify the petitioner, other parties to the investigation, and the other agency of its determination and of the facts and conclusions of law upon which the determination is based \* \* \*.

19 U.S.C. § 1673(d) (1988). The former statute did "not require that an agency make an explicit response to every argument made by a party, but instead require[d] that issues material to the agency's determination be discussed so that the 'path of the agency may reasonably be discerned' by a reviewing court." Statement of Administrative Action, accompanying H.R. Rep. No. 103-826(I), at 892, reprinted in 1994 U.S.C.A.N. 4040, 4215 ("SAA") (citation omitted). See also *Jeanette Sheet Glass Corp. v. United States*, 9 CIT 154, 161, 607 F. Supp. 123, 130 (1985) (quoting H.R. Doc. No. 96-153, at 27 (1979), reprinted in 1979 U.S.C.A.N. 381, 666, 685). In contrast, the URAA includes in addition to the above-quoted language 19 U.S.C. § 1677(f), under which "the agencies must specifically reference in their determinations factors and arguments that are material and relevant, or must provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument." SAA, at 892, reprinted in 1994 U.S.C.A.N. at 4216 (emphasis added).

<sup>7</sup>*USEC, Inc. v. United States*, 132 F. Supp. 2d 1 (Ct. Int'l Trade 2001), is not to the contrary. First, the economic model that the ITC allegedly failed to consider in that case had been developed not by ITC staff but by the Department of Energy to make predictions about the U.S. uranium market. See *id.* at 7 n.9. The ITC naturally has greater flexibility in choosing not to follow analyses conducted under the auspices of another agency, particularly one that is not an independent agency, such as executive departments. Cf. *Humphrey's Executor v. United States*, 295 U.S. 602, 628-29 (1935) (emphasizing distinction between independent agency and executive departments). Second, as the *USEC* court explained, the economic model at issue was not "material" to the ITC's analysis because the model examined only a limited segment of the product market at issue, whereas the ITC had reasonably concluded that the product market should not be evaluated in segments. See *USEC*, 132 F. Supp. 2d at 16.

The Commission does not support its reasoning with substantial evidence.<sup>8</sup> The Commission relied solely on record evidence suggesting that Japanese importers tend to require 13–26 weeks from the time of order to arrival. See *Staff Report*, at II–29. Altix urges the use of another time period, between the time of export to delivery, which can be less than two weeks, because an order may be canceled at anytime until the hollow product is exported, thereby lowering the volume of subject imports. In support of its claim, Altix points to record evidence that a purchaser of imported hollow products “dropped Japanese mills because of dumping suit filed.”<sup>9</sup> *Purchasers’ Questionnaire Response* (July 14, 2000), at 9, C.R. Doc. 361, Pl.’s App., Tab 5, at 2. If the Plaintiffs’ far-shorter time-span is employed instead of the Commission’s, the decline in subject import volume in the first half of 1999 may indeed have been in response to the imminent filing of the petition. The potential two-week period precludes the ITC from concluding that, as a matter of logical deduction only, reduced volumes of subject imports could not have resulted from rumors of an antidumping investigation, as the ITC apparently concluded in the Final Determination.

The Final Determination does not offer a reasonable explanation for why the Commission’s time period is the operative one as opposed to Plaintiffs’ two-week period. “In order to ascertain whether action is arbitrary, or otherwise not in accordance with law, reasons for the choices made among various potentially acceptable alternatives usually need to be explained.” *Bando Chem. Indus., Ltd. v. United States*, 16 CIT 133, 136, 787 F. Supp. 224, 227 (quoting *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1177, 704 F. Supp. 1068, 1071 (1988)), *aff’d*, 26 F.3d 139, 1994 WL 163953 (Fed. Cir. 1994). Absent such explanation, the Commission’s conclusion rests on a mere theoretical possibility that the decline in volume was more likely attributable to a decline in orders placed in mid-to-late 1998, unrelated to unfair trade proceeding activities. Such speculation cannot constitute substantial evidence. *Pohang Iron & Steel Co. v. United States*, No. 98–04–00906, 1999 WL 970743, at \*11 (Ct. Int’l Trade Oct. 20, 1999); *China Nat’l Arts & Crafts Import & Export Corp. v. United States*, 15 CIT 417, 421–22, 771 F. Supp. 407, 411–12 (1991).<sup>10</sup>

#### *C. Displacement of the domestic like product by nonsubject imports*

The statute provides that the Commission shall analyze the significance of subject import volumes “in absolute terms or relative to production or consumption in the United States \* \* \*.” 19 U.S.C.

<sup>8</sup> Altix did possess the burden of producing evidence to support its assertion of rumors of an imminent petition. Yet, as the Commission’s argument assumed the existence of industry knowledge of the impending antidumping investigation, the court reviews whether the ITC’s conclusions were supported by substantial evidence without regard to the validity of Plaintiffs’ claims of rumors.

<sup>9</sup> The court takes no position on the probative value of this evidence as support for Plaintiffs’ position. It is up to the ITC to weigh evidence. See *Mukand Ltd. v. United States*, 20 CIT 903, 906–07, 937 F. Supp. 910, 914–15 (1996).

<sup>10</sup> The court of course recognizes that the ITC’s decision to discount data otherwise affected by the filing of the antidumping petition is discretionary, see 19 U.S.C. § 1677(7)(D), and that the ITC, therefore, is not required to discount the relevant data even if the agency finds a change in data to be related to the pendency of the investigation. Nevertheless, the Commission may abuse its discretion where, as here, the agency employs an irrational basis for its conclusion. See *Bando*, 787 F. Supp. at 226–27.

§ 1677(7)(C)(i). As nonsubject imports constitute a share of the merchandise consumed domestically, the ITC properly examined their role in the U.S. market. In the Final Determination, the Commission states:

Nonsubject market share was greater than subject market share for most of the period. Indeed, from 1998 to 1999, the declining presence of subject imports in the U.S. market was more than made up for by increasing nonsubject import volumes even as apparent U.S. consumption declined.

*Final Determination*, at 15–16 (footnotes omitted). The inference to be drawn, apparently, is that nonsubject imports were a significant competitive presence in the market, displacing both subject imports and domestic like products.

Relying on *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720–22 (1997), Plaintiffs initially argue, incorrectly, that the Commission bears a burden to show a causal link between nonsubject imports and the state of the domestic industry. Plaintiffs are undoubtedly correct that *Gerald Metals* placed on the Commission the burden of showing a “causal—not merely temporal—connection between the LTFV goods and the material injury.” Pl.’s Initial Br., at 13 (quoting *Gerald Metals*, 132 F.3d at 720). The Commission’s duty to establish such a causal link followed necessarily and exclusively from the statute’s mandate that material injury to the domestic industry be “by reason of” dumped imports. *Gerald Metals*, 132 F.3d at 719–23. See also *Gerald Metals, Inc. v. United States*, 27 F. Supp. 2d 1351, 1354 (Ct. Int’l Trade 1998) (discussing Federal Circuit’s decision in *Gerald Metals*). There is no statutory requirement that the Commission similarly show a causal link between nonsubject imports (i.e., imports that have not been identified as being sold at less than fair value) and material injury. Rather, the ITC is permitted to conclude that other factors, whether they themselves may be said to “cause” injury, certainly undermine the notion that dumped imports are a cause of injury. In this case, a positive correlation concerning nonsubject import volumes, in conjunction with other factors, may be sufficient to cut the causal link between subject imports and any harm suffered by the domestic industry.

Nevertheless, the Commission has failed to support rationally its conclusion regarding the significance of nonsubject import volumes. The Final Determination refers only to 1998–99 figures, which indicate that in a period of declining consumption, nonsubject imports increased considerably in market share, while the market share for domestic like product rose slightly and subject imports decreased appreciably. See *Final Determination*, at 16 & n.72 (citing *Staff Report*, at Table IV–5).<sup>11</sup> Moreover, the Commission noted that “some purchasers perceive nonsubject hollow products to be a generally more competitive alternative to Japanese products than the domestic products.” *Id.* at 16 n.72. This

<sup>11</sup> Table IV–5 of the Staff Report reveals the following shifts in market share from 1998 to 1999, respectively: nonsubject imports—from 1% to 1%; subject imports—from 1% to 1%; and domestic like product—from 1% to 1%. U.S. consumption in the same period fell from 1 short tons to 1 short tons, a decline of 1%.

evidence suggests at the very least circumstantial proof of displacement of both subject imports and the domestic like product by nonsubject imports.

While the data cited by the ITC may give rise to a reasonable inference that nonsubject imports detracted from the significance of subject import volumes, a rational application of the Commission's rationale to the entire POI, however, reveals contrary conclusions. In particular, the Commission's reasoning as regards nonsubject imports between 1998 and 1999 raises potentially significant unsettled questions when applied to the 1997-98 period, at the beginning of the POI. Between 1997 and 1998, in a time of rising consumption, market share for the domestic like product and nonsubject imports fell while subject import market share rose markedly.<sup>12</sup> Following the Commission's reasoning, this record evidence suggests, at least circumstantially, that the increased consumption in the first part of the POI was captured primarily by subject imports. Therefore, in contrast to the conclusion for the 1998-98 time period, the ITC's rationale would indicate that subject imports displaced both nonsubject and domestic like products between 1997 and 1998.

The Commission may of course permissibly focus its analysis on a specific time frame within the POI. See *Taiwan Semiconductor Indus. Ass'n v. United States*, 105 F. Supp. 2d 1363, 1373 n.13 (Ct. Int'l Trade 2000) ("*Taiwan Semiconductor II*"); *Angus Chem. Co. v. United States*, 20 CIT 1255, 1258-59, 944 F. Supp. 943, 947-48 (1996), *aff'd*, 140 F.3d 1478 (Fed. Cir. 1998). It is likewise axiomatic that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Grupo Industrial Camesa v. United States*, 85 F.3d 1577, 1582 (Fed. Cir. 1996) (quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)). Nevertheless, the Commission "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Pohang*, 1999 WL 970743, at \*11 (quoting *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 378 (1998) (emphasis added)). Having employed a rationale to interpret data from the later part of the POI in such a manner as to support its conclusion, the Commission may not ignore the fact that the same rationale applied to data from the earlier part of the POI weakens its conclusion with regard to nonsubject imports. Further explanation is required on remand for the agency to

<sup>12</sup> Table IV-5 of the Staff Report reveals the following shifts in market share from 1997 to 1998, respectively: non-subject imports—| 1% to | 1%| 1%; subject imports—| 1% to | 1%; and domestic like product—| 1% to | 1%. U.S. consumption in the same period rose from | | short tons to | | short tons, an increase of over | 1%.

support its reasoning that nonsubject imports were so significant as to have displaced subject imports and the domestic like product.<sup>13</sup>

#### D. Attenuated competition

The Commission observed a range of subject imports for which no domestic like product existed. In light of this lack of competition, the ITC found in its Final Determination that "any increased competition from rising subject import volumes between 1997 and 1998 was at least somewhat attenuated \* \* \*." *Final Determination*, at 16. Both parties seem to agree on the relevant underlying data, but draw diametrically opposed conclusions therefrom. Plaintiffs point to what they characterize as "overwhelming" competition between subject imports and the domestic like product based on the significant percentage of the product market in which domestic and Japanese producers compete directly with one another. Pl.'s Initial Br., at 22-23. The Commission relies on the inverse of the same data and emphasizes the relative absence of the domestic industry from a sizeable portion of the market.<sup>14</sup> ITC Br., at 16-17.

Two pieces of significant evidence referred to in the Final Determination support the finding of attenuated competition. First, between 1997 and 1999, the percentage range of subject imports for which there was no competition from the domestic industry increased over 50%, showing the domestic industry becoming significantly less competitive with subject imports over the POI. See *supra* note 14. Questionnaire responses indicating that domestic sources were unable to satisfy purchasers' requirements further corroborate this trend. See, e.g., *Staff Report*, at II-26 to II-27. Second, the bankruptcy of a significant domestic manufacturer may have amplified this trend. In 1997, ALTech Specialty Steel Corp. ("ALTech"), a domestic producer, went bankrupt and then ceased production of hollow products.<sup>15</sup> *Staff Report*, at Table III-1 n.1; *Hearing Transcript* (July 12, 2000), ITC App., P.R. Doc. 72, at 156 (testimony of Mr. Curran). To compensate, purchasers, including one that had relied on ALTech for 75 percent of its annual requirement of a certain product, were forced to seek alternative suppliers, including Japanese producers. See *Hearing Transcript*, at 156 (testimony of Mr. Curran). Thus, between 1997 and 1998, this singular event further reduced the domestic industry's competitiveness with subject imports. The court finds that the above evidence substantiates the Commission's finding of attenuated competition.

<sup>13</sup> In this regard, Plaintiffs claim that the ITC relies on evidence, contained in Table IV-5 of the Staff Report, which supports a contrary position. Specifically, Plaintiffs compare the level to which subject imports fell between 1998 and 1999 and the level to which nonsubject imports rose during the same period. Plaintiffs would have this court construe the spread between these two figures as a fatal flaw in the Commission's arguments. The court is not persuaded. Demonstration of a possible correlation between nonsubject imports and the subject market need not always rely on a one-to-one match in order to undermine sufficiently the possibility of a causal link between dumped imports and material injury.

<sup>14</sup> Table I-2 of the Staff Report provides the underlying data regarding competition between subject imports and the domestic like product. The Table reveals that for the years 1997-1999, respectively the domestic industry produced no goods to compete with subject imports in | 1%, | 1%, and | 1% of the market. *Staff Report*, at Table I-2. From the perspective of Plaintiffs, these figures suggest that the domestic like product competed with subject imports in | 1%, | 1%, and | 1% of the market from 1997 to 1999, respectively.

<sup>15</sup> ALTech's assets and manufacturing facility were bought by another entity, and operations resumed as ALTX, Inc., one of the plaintiffs in the present action. *Staff Report*, at Table III-1 n.1.

In summary, of the four reasons offered by the Commission for its negative determination as regards the significance of subject import volumes, the court finds that only one is supported by substantial evidence, namely attenuated competition between subject imports and the domestic like product.<sup>16</sup> While the affirmed finding of attenuated competition is important, the court is unwilling at this point to uphold the Commission's conclusion regarding the significance of subject import volumes as based on substantial evidence in light of the lack of explanations as to potentially meaningful conflicting evidence. The court therefore remands to the Commission for further consideration and clarification of the issues concerning the correlation between subject import volumes and the condition of the domestic industry, including the significance of nonsubject imports and whether awareness of an imminent petition affected the drop in subject import volume in the first half of 1999.

## II. Price Effects

In evaluating the price effects of subject imports, the ITC is required to determine whether

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii). The Commission determined that underselling was not significant and that subject imports caused neither price depression nor price suppression. See *Final Determination*, at 17-19.

### A. Significance of Underselling

Citing the Commission's findings on the percentage of price comparisons that reveal underselling by subject imports, Plaintiffs initially argue that the agency's conclusion with regard to underselling is inconsistent with past ITC rulings in which significant underselling was established by underselling in 40-50 percent of the price comparisons,<sup>17</sup> significantly fewer than the percentage in this case.<sup>18</sup> Plaintiffs effectively request this court to find as a matter of law that underselling was

<sup>16</sup> Plaintiffs advance two other ultimately failing arguments, namely that the ITC's rationale makes two unfounded assumptions: (1) that subject imports must be increasing in the most recent period to be significant, and (2) that declining subject imports cannot contribute to worsening material injury to the domestic industry. These two claims essentially accuse the Commission of relying solely on one factor in arriving at its volume conclusion, specifically, the decline of subject import volume between 1998 and 1999. Although this decline seems indeed an important consideration, the Final Determination clearly takes into account several other factors as well, such as nonsubject import volumes and attenuated competition. See *supra* Parts I.C. & I.D. As the Final Determination considers the decline of subject import volume in light of these other factors, the ITC does not make the unfounded assumptions of which Plaintiff complains, and these two arguments are without merit.

<sup>17</sup> See, e.g., *Certain Stainless Steel Plate from Belgium, Canada, Italy, Korea, South Africa and Taiwan*, Invs. Nos. 701-TA-376, 377, and 379, and 731-TA-788 to 793 (Final), USITC Pub. 3188, at 18, V-28 (May 1999); *Stainless Steel Bar from Brazil, India, Japan and Spain*, Invs. Nos. 731-TA-678, 679, 681, and 682 (Final), USITC Pub. 2856, at I-17 to I-18 (Feb. 1995).

<sup>18</sup> Plaintiffs cite record evidence claiming that subject imports undersold the domestic like product in 1 % of reported purchaser price comparisons and 1 % of reported supplier price comparisons. See Pl.'s Initial Br., at 25 (citing *Staff Report*, at Tables V-2 to V-10).

significant. The Commission, however, is not compelled to find a certain percentage of underselling to be significant in one investigation merely because it has done so in previous cases. See *Czeszochowa v. United States*, 19 CIT 758, 783, 890 F. Supp. 1053, 1073 (1995). The significance of underselling in an investigation will necessarily depend on the particulars of the product and industry at issue, not necessarily on the import of certain percentages understood in the abstract. To bind the Commission by such previous determinations on inherently fact-specific criteria would contradict the specific congressional mandate that "[t]he significance of the various factors affecting an industry will depend upon the facts of each particular case." S. Rep. No. 96-249, at 88 (1979). See also *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1087-88 (1988) ("[T]he Commission's determinations must be based upon an independent evaluation of the factors with respect to the unique economic situation of each product and industry under investigation.").

The Commission found that underselling was not significant under the first prong of 19 U.S.C. § 1677(7)(C)(ii) because there was a lack of correlation between (1) underselling and price trends, and (2) underselling and the condition of the domestic industry. The first basis relied upon by the Commission cannot substantiate its finding of no significance with regard to underselling. Section 1677(7)(C)(ii) requires the Commission to undertake two distinct analyses to examine (1) the significance of underselling and (2) the causal connection between subject imports and price depression and/or suppression. The ITC may not simply refer to its conclusion regarding the effect of underselling on price depression and/or suppression as a basis for finding underselling not to be significant; such bootstrapping collapses the two statutorily-mandated discrete inquiries and is therefore contrary to the plain language of the statute.

The Commission is on firmer ground, however, when relying on the lack of correlation between underselling and the condition of the domestic industry. Evidence of consistent underselling that occurs while the domestic industry is performing favorably may reasonably undercut the significance attributed to underselling. See, e.g., *Coalition for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 15 F. Supp. 2d 918, 925 (Ct. Int'l Trade 1998). Nevertheless, because the ITC failed to respond to apparently important arguments regarding what Plaintiffs characterize as the Commission's misunderstanding of the condition of the domestic industry, see *supra* Part I.A., the agency may arrive at a different perception of the health of the domestic industry. Therefore, the ITC must reconsider on remand whether a lack of correlation between underselling and the condition of the domestic industry remains after evaluating Plaintiffs' arguments, and if so, whether that factor is sufficient for the Commission to conclude that underselling is not significant.

### B. Effect of Underselling on Price Depression and/or Suppression

With respect to the second prong of 19 U.S.C. § 1677(7)(C)(ii), the Commission found that underselling by subject imports caused neither price depression nor price suppression. The ITC identified four bases for its conclusion: (1) although prices for the domestic like product declined over the POI, underselling at times occurred during periods when domestic prices were stable or rising; (2) price declines in certain periods reflected decreased raw material costs; (3) price declines in other periods reflected a softening of demand; and (4) the influence of nonsubject import volumes. See *Final Determination*, at 17-18.

As an initial matter regarding the impact of subject imports on price depression and/or suppression, the ITC again ignored Plaintiffs' reference to specific portions of the Staff Report that supported Plaintiffs' position and that were flatly inconsistent with the ITC's price effects conclusion. Particularly, Plaintiffs cite the findings of the ITC econometric analysis that dumped imports resulted in a "3.0 percent to 11.0 percent reduction in price" for domestic goods. *Staff Report*, at F-3. The agency must explain on remand why it believes such a finding to be inaccurate, inapplicable, or otherwise not relevant as the ITC formulates its own independent conclusions.

Regarding the correlation between underselling and stable or rising domestic prices,<sup>19</sup> Plaintiffs argue that stable prices during portions of 1998 are not necessarily indicative of the absence of price suppression because domestic prices may have risen higher than indicated but for the presence of underselling imports. They further assert that, in the face of significantly rising demand and declining unit cost of goods, the domestic industry should have performed more favorably than its modest showing in 1997-1998. Plaintiffs, however, have provided no evidence to substantiate the assertion that the domestic industry could have enjoyed larger profits absent the underselling imports. Evidence such as historic domestic industry performance under similar circumstances, or econometric data demonstrating the effect of underselling in periods of increased demand and lower unit costs, may have been instructive. Of course it may be possible, as Plaintiffs describe, that the domestic industry did in fact suffer price suppression as a result of subject imports. Nevertheless, more is required for the Commission to find price suppression: "the 'mere possibility' standard is not sufficient for a determination that must be based on substantial evidence." *Chung Ling Co. v. United States*, 16 CIT 636, 644-45, 805 F. Supp. 45, 52 (1992) (quoting *China Nat'l Arts*, 771 F. Supp. at 422).

The Commission further attributed price declines between the first quarter of 1997 and the fourth quarter of 1998 to lower raw material

<sup>19</sup> For example, out of nine products, domestic prices reported by suppliers for product 1 rose from \$1 | to \$1 | per linear foot between January and June 1997, as subject import prices fell from \$1 | to \$1 | per linear foot. See *Staff Report*, at Table V-2. Between January and December 1998, domestic prices reported by purchasers for product 1 rose from \$1 | to \$1 | per linear foot, as subject import prices fell from \$1 | to \$1 | per linear foot. See *id.* For pricing product 4, domestic prices reported by suppliers were stable at \$1 | per pound between January and September 1997, as subject import prices fell from \$1 | to \$1 | per pound. See *id.* at Table V-5.

costs,<sup>20</sup> and price declines between the fourth quarter of 1998 and the fourth quarter of 1999 to reduced demand.<sup>21</sup> *Final Determination*, at 18. In each of those time periods, however, record evidence calls into doubt the rationale underlying the Commission's explanation for declining prices throughout the POI. For example, during the time period in which the ITC attributed declining domestic prices to lower raw material costs, demand increased sharply,<sup>22</sup> while in the period for which low demand was cited as the cause of declining domestic prices, raw material costs grew dramatically.<sup>23</sup> If raw material costs were so significant as to cause a reduction in prices during the earlier period, in the face of a significant rise in demand, how then was the effect of soaring raw material costs in the later period so easily overwhelmed by a more modest decline in demand? Or, vice versa, if a modest decline in demand could dictate lower domestic prices in the later period, notwithstanding rapidly increasing raw material costs, how was a notably larger spike in demand overshadowed in its price effects by a smaller decline in raw material costs in the earlier period? Although "it is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence," *Taiwan Semiconductor Indus. Ass'n v. United States*, 118 F. Supp. 2d 1250, 1260 n.15 (Ct. Int'l Trade 2000) ("*Taiwan Semiconductor III*) (quoting *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985)), the Commission here has "failed to articulate a 'rational connection between the facts found and the choice made.'" *Bando*, 787 F. Supp. at 227 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). The ITC has failed to explain why, in evaluating price effects for one time period, it chose to disregard a factor that had been presumably deemed determinative for another time period in the POI. If these price declines are factually significant, as the ITC's discussion seems to indicate, on remand the ITC should clarify the relevance of demand and raw material costs to domestic prices and explain how they may affect each other as explanatory variables for domestic price declines.<sup>24</sup>

The Commission also noted the high volume of nonsubject imports at a time when European (i.e., nonsubject) producers were the price lead-

<sup>20</sup> Domestic prices for Q1 1997 and Q4 1998, respectively were as follows: product 1 - \$1 | and \$1 |; product 2 - \$1 | and \$1 |; product 3 - \$1 | and \$1 |; product 5 - \$1 | and \$1 |; product 6 - \$1 | and \$1 |; product 9 - \$1 | and \$1 |. See *Staff Report*, at Tables V-2 to V-4, Tables V-6 to V-7, and Table V-10. The prices for differing grades of the primary inputs during Q1 1997 and Q4 1998, respectively were as follows: grade 304 - \$1 | and \$1 | per ton; grade 316 - \$1 | and \$1 | per ton. See *id.* at Table V-1.

<sup>21</sup> Domestic prices for Q4 1998 and Q4 1999, respectively were as follows: product 3 - \$1 | and \$1 |; product 4 - \$1 | and \$1 |; product 5 - \$1 | and \$1 |; product 7 - \$1 | and \$1 |; product 9 - \$1 | and \$1 |. See *Staff Report*, at Tables V-4 to V-6, Table V-8, and Table V-10. Apparent U.S. consumption declined 1% in the same period. See *id.* at Table C-1.

<sup>22</sup> Demand increased 1% between 1997 and 1998. See *Staff Report*, at Table C-1.

<sup>23</sup> Between Q4 1998 and Q4 1999, the costs of the differing grades of the primary inputs increased as follows: grade 304 - from \$1 | to \$1 | per ton; grade 316 - from \$1 | to \$1 | per ton, reflecting increases of 1% and 1%, respectively. See *Staff Report*, at Table V-1. In contrast, raw material costs decreased 1% and 1%, respectively, between Q1 1997 and Q4 1998. See *id.*

<sup>24</sup> Altix also argues that the ITC failed to establish a causal link between the declining domestic prices, on the one hand, and lower raw material costs and reduced demand, on the other, and that the agency thereby violated the command of *Gerald Metals*, 132 F.3d 716. As discussed *supra* at Part I.C., this argument is without merit because Altix misreads *Gerald Metals*.

ers in the market as a basis for finding no price depression and/or suppression caused by subject imports. *Final Determination*, at 18. The ITC based this finding on testimony from a large U.S. purchaser, stating that "Japan was not the price leader" and explaining the means by which the European producers set prices well ahead of the industry.<sup>25</sup> See *Hearing Transcript*, at 151-52. Altz challenges the ITC's reliance on this testimony on the ground that the purchaser spoke of European price leadership solely in the context of pipe products. See *id.* (discussing patterns of seamless pipe pricing, including price moves on seamless pipe by two European firms; noting that "the most dramatic price falls at the mill level in the U.S. seamless pipe market occurred in 1999 \* \* \*"). Because pipe products reflect a minority percentage of the subject merchandise,<sup>26</sup> Altz argues that even if the testimony is accepted by the Commission, the statements cannot constitute substantial evidence to support a finding of European price leadership. Although the figures reflected in the percentage of the subject market covered by pipe products are not insignificant, they are not sufficiently high for the court to assume, as the ITC seems to, that any characterization of the pipe products submarket should naturally apply to the remainder of the subject products. Unfortunately, the ITC failed to respond, either in the *Final Determination* or in its brief, to Plaintiffs' concerns regarding the extent to which the testimony's description of price leadership can be said to be representative of the industry. In light of the relatively low share of the market held by pipe products, the court cannot accept the Commission's decision to rest its conclusion on the sole piece of testimonial evidence, without further explanation of why the ITC deems this indicative of the broader industry. Therefore, on remand the ITC must reconsider and support its conclusions with regard to price effects.

### III. Impact on Domestic Producers

The ITC must examine the impact subject imports have on the domestic industry, identifying such impact by evaluating "all relevant economic factors which have a bearing on the state of the industry in the United States," including, *inter alia*, performance indicia specified by statute, such as capacity utilization, inventories, output, market share, and profits. 19 U.S.C. § 1677(7)(C)(iii). The Commission concluded that subject imports did not have a significant adverse impact on the domestic industry based on (1) the lack of significant volume and price effects, (2) the favorable profitability and overall improvement in the financial condition of the domestic industry, and (3) the lack of correlation between the presence of subject imports and trends in several important indicia

<sup>25</sup> The *Final Determination* also cites a page from the Staff Report in addition to the quoted testimony. See *Final Determination*, at 18 n.88 (citing *Staff Report*, at 11-21 and *Hearing Transcript*, at 151-52). The court is unable to ascertain what relevance the cited page from the Staff Report has to the issue of European leadership. In any event, it adds no further support to the Commission's nonsubject import finding than what is provided by the testimony.

<sup>26</sup> Plaintiffs identify the pipe products as 11, Pl.'s Initial Br., at 32-33, and then refer to the Staff Report, in which those products identified by Plaintiffs represent 11% of the domestic like product and 11% of the Japanese subject merchandise. See *Staff Report*, at Table I-1. The Staff Report table also identifies a group of products as 11, which may or may not be relevant to calculating the proportion of the market held by pipe products. See *id.* Whether or not this category should be joined with the category identified by Plaintiffs does not alter the court's analysis as follows.

of the domestic industry's condition. *Final Determination*, at 22. Plaintiffs challenge the Commission's impact finding on three grounds: (1) the ITC improperly ignored the findings of the Staff Report; (2) the ITC's reliance on non-representative data in characterizing the healthy condition of the domestic industry; and (3) the ITC's failure to evaluate the domestic industry in light of semi-annual (as opposed to annual) data.<sup>27</sup>

Altix first points to findings of the Commission's econometric analysis contained in the Staff Report, stating that dumped imports resulted in an approximately "11.3 percent to 25.3 percent reduction in revenue" for the domestic industry. *Staff Report*, at F-3. As the court discussed *supra* in Part I.A., the Commission violates the statute when it fails to respond to such clear contrary evidence contained within its own Staff Report that an interested party has brought to the agency's attention. 19 U.S.C. § 1677f(i)(3)(B). On remand the Commission must address the relevance, if any, of this finding to the agency's conclusion regarding the impact of subject imports on the domestic industry.

Altix next challenges the Commission's finding that the domestic industry continued to perform favorably overall during the POI. Altix observes that certain segments of the domestic industry actually benefitted from dumped imports because companies in those segments relied on subject imports in the production of certain finished goods. Effectively characterizing this observation as a unique feature of competition within the domestic industry, Altix insists that the Commission erred in relying on data that reflected the performance of domestic producers in the aggregate. The true impact of subject imports, argues Altix, could only be recognized by considering the condition of those domestic producers that do not import subject merchandise separately from those that do.

The evaluation by the ITC of the domestic industry in the aggregate was proper. Although one segment of the industry may benefit from dumping while another segment is harmed, the statute does not permit the ITC to manipulate its material injury analysis in favor of petitioners by focusing exclusively on the segment of the defined industry that is harmed.<sup>28</sup> Dumping duties may be imposed only after "the Commission determines that an *industry* in the United States is materially injured, or is threatened with material injury \* \* \*." 19 U.S.C. § 1673(2) (emphasis added). The statute defines "industry" as "the producers *as a [w]hole* of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A) (emphasis

<sup>27</sup> Plaintiffs also claim that the Commission's reliance on its volume and price effects analyses to support its conclusion regarding the impact of subject imports on the domestic industry is erroneous, based on the arguments discussed above in parts I and II. Because the court is remanding for the Commission to reconsider material aspects of those portions of its decision, the Commission on remand should also reassess the relevance of its reconsidered volume and price effects analyses to its evaluation of the impact of subject imports.

<sup>28</sup> Although the court speaks in terms of "segments" of the industry, it should be noted that the argument addressed here is distinct from the matter of market segmentation, which focuses on the competition between products and is not at issue here. See, e.g., *Bic Corp. v. United States*, 21 CIT 448, 452-54, 964 F. Supp. 391, 397-98 (1997); *General Motors Corp. v. United States*, 17 CIT 697, 706-11, 827 F. Supp. 774, 783-87 (1993).

added). The Commission is permitted to exclude from the domestic industry "a producer of the domestic like product [that] is also an importer of the subject merchandise," 19 U.S.C. § 1677(4)(B), but this exclusion occurs at the earlier stage of the Commission's analysis in which the Commission defines the domestic industry. *See Final Determination*, at 10-12. With regard to evaluating the impact of subject imports, the statute requires the Commission to focus on the "state of the industry," 19 U.S.C. § 1677(7)(C)(iii), as

that term has already been defined for purposes of the given investigation.<sup>29</sup> The only narrowing of the "industry" provided by statute in examining the impact of subject imports provides that the Commission should evaluate only those "production operations within the United States." 19 U.S.C. § 1677(7)(B)(i)(III). This provision has no bearing in this case. Therefore, once the domestic "industry" has been identified, as it apparently was without protest from Plaintiffs,<sup>30</sup> the ITC properly declines to redefine the components of the "industry" to facilitate a finding of injury based on the fact that some members of the industry import subject merchandise.<sup>31</sup> *Cf. Encon Indus., Inc. v. United States*, 16 CIT 840, 842 (1992) (permitting ITC to evaluate injury based on industry as a "whole" in order to "protect[] the process from the type of maneuvering attempted by plaintiff").

Plaintiffs argue finally that even if the industry is not viewed in producer segments by reason of importation of subject merchandise, the semi-annual data collected by the agency at Plaintiffs' request undermines the Commission's finding of lack of correlation between subject imports and indicia of the domestic industry's performance. Although the ITC is not required to rely on the semi-annual data simply because it agreed to seek such information, *General Motors*, 827 F. Supp. at 781, its

<sup>29</sup> In *SKF USA Inc. v. United States*, Nos. 00-1423 & 00-1465, 2001 WL 959324, at \*7-9 (Fed. Cir. Aug. 24, 2001), the court noted the rule of statutory construction set forth in *Sorenson v. Treasury*, 475 U.S. 851, 860 (1986). As the Supreme Court has observed,

[t]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. . . . But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subjectmatter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.

*Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Consistent with this decision and its progeny, the Federal Circuit in *SKF*, while recognizing the normal presumption, remanded the case so that the agency could attempt to provide a reasonable explanation for applying different definitions of the same phrase. 2001 WL 959324, at \*8. The appellate court did recognize that the two provisions containing the phrase "foreign like product" were "directed to the same calculation." *Id.* Nevertheless, it permitted remand where the agency might have a plausible explanation for distinguishing between "foreign like product" in the context of normal value (which is based on actual prices), 19 U.S.C. § 1677b(1)(B), and in the context of constructed value (which is based on data reflecting typical components of prices), 19 U.S.C. § 1677b(e), particularly given the calculating complexities involved. *SKF*, 2001 WL 959324, at \*8. Unlike the two provisions at issue in *SKF*, the sections referring to "industry" here are not distinct, but rather, one builds on the other. In any case, the ITC has not attempted to support two different definitions of industry here.

<sup>30</sup> The ITC claims that Plaintiffs did not challenge the composition of the domestic industry, ITC Br., at 33 & n.24, and Plaintiffs have not contested this characterization.

<sup>31</sup> That the "Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry," 19 U.S.C. § 1677(7)(C)(iii), does not mean that it is likely that Congress intended domestic entities to utilize the unfair trade proceedings to secure a competitive advantage over their domestic competitors who happen to import some of the subject product. Presumably, if the ITC deems the competitor an "importer" rather than a domestic producer, the competitor will be excluded at the outset.

proffered reasons for discounting the semi-annual data are unreasonable. First, the ITC observed that "the semiannual data are not directly comparable to the annual data due to the absence of semiannual data from three domestic producers." *Final Determination*, at 22 n.109. As Plaintiffs point out, however, the three producers that did not provide semiannual data represented a relatively small portion of domestic production for 1999. See *Staff Report*, at Table III-1 & Table C-6 n.2.<sup>32</sup> While the ITC may conclude that the percentage of production represented by these three firms is significant for some reason, such a percentage is not so high as to render the semi-annual data *per se* unreliable or unreflective, without further explanation by the agency. Second, the ITC noted that subject imports declined in the first half of 1999 at the same time that relevant indicia of domestic industry performance declined, suggesting a lack of causal nexus between subject imports and material injury to the domestic industry. *Final Determination*, at 22 n.109. In this regard, as discussed *supra* at Part I.A., the ITC must evaluate and respond to Plaintiffs' arguments concerning the correlation of the domestic industry's performance with trends in the presence of subject imports. The ITC's finding of lack of correlation must therefore be re-examined upon remand.

#### IV. Threat of Material Injury

In addition to evaluating whether the domestic industry was materially injured by reason of dumped imports, the Commission also concluded pursuant to 19 U.S.C. § 1673(2)(A)(II) that there was no threat of material injury by reason of dumped imports. The Commission is required by statute to consider a variety of relevant economic factors before determining that dumped imports are "imminent" and thereby threatening the domestic industry with material injury. 19 U.S.C. § 1677(7)(F)(i) & (ii). See also *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983-84 (Fed. Cir. 1994). The statute cautions, however, that "[s]uch a determination may not be made on the basis of mere conjecture or supposition." 19 U.S.C. § 1677(7)(F)(ii).

The ITC based its conclusion on the following observations:

(1) Subject import volumes are likely to decline based on (a) declines in subject import volumes during the latter part of the POI, which the Commission had already determined not to be attributable to the filing of the dumping petition, and (b) expected increases in Japanese shipments to the home market and third-country markets, *Final Determination*, at 23.<sup>33</sup>

<sup>32</sup> The three firms with no reported semiannual data, | |, | |, and | |, accounted for | % of domestic production, respectively. *Staff Report*, at Table III-1 & Table C-6 n.2. Thus, the non-reporting firms together accounted for only | % of U.S. production in 1999.

<sup>33</sup> Japanese shipments to third-country markets were | short tons in 1997, | short tons in 1998, and | short tons in 1999. They were expected to increase to | short tons in 2000 and | short tons in 2001. Japanese home market shipments were | short tons in 1997, | short tons in 1998, and | short tons in 1999. They were expected to increase to | short tons in 2000 and | short tons in 2001. See *Staff Report*, at Table VII-2.

(2) Expected increases in Japanese production capacity and capacity utilization were not significant in light of the finding regarding likely subject import volumes, *id.* at 24;<sup>34</sup>

(3) Any increases in subject import volumes would likely come at the expense of nonsubject imports rather than the domestic like product because record evidence revealed Japanese products to be very comparable to nonsubject imports and generally preferred over domestic products, *id.* at 23-24;<sup>35</sup>

(4) Future subject imports will have little impact on prices for the domestic like product in light of the Commission's underselling findings in its present material injury analysis, *id.*;

(5) Inventories of U.S. importers and Japanese producers were lower in 1999 and interim 2000 than in the remainder of the POI, *id.* at 24-25;<sup>36</sup>

(6) Product-shifting resulting from existing antidumping duty orders on other steel products was unlikely to increase subject import volumes significantly because of "extensive" Japanese home market and increased third-country shipments, *id.* at 25; and

(7) Record evidence indicated that the domestic industry was not significantly concerned with the possibility of negative effects of subject imports on the industry's production and development efforts.<sup>37</sup> *Id.* at 25.

In light of the earlier discussion regarding the Commission's present material injury analysis, the court cannot sustain the agency's first four observations as support for its conclusion regarding threat of material injury. First, the finding that subject import volume was not likely to increase considerably was premised, in part, on the Commission's earlier conclusions that volumes were not significant and could not be attributed to the imminent filing of the antidumping petition. See *Final Determination*, at 23. The court has already found those conclusions to warrant reconsideration so that the ITC may consider Plaintiffs' relevant arguments and respond to them appropriately. See *supra* Part I. Second, because the observation regarding Japanese production capacity and capacity utilization was itself based on the finding regarding likely subject import volumes,<sup>38</sup> such observation must also be reevaluated after new volume findings are made on remand.

<sup>34</sup> Japanese production capacity was | | short tons in 1997, | | short tons in 1998, and | | short tons in 1999, and was expected to increase to | | short tons in 2000 and | | short tons in 2001. See *Staff Report*, at Table VII-2. Japanese capacity utilization was | % in 1997, | % in 1998, and | % in 1999, and was expected to increase to | % in 2000 and | % in 2001. See *id.*

<sup>35</sup> Questionnaire responses indicate that Japanese and European products are "very comparable" and that particularly for those products not produced by U.S. firms, European producers are the only alternative to the Japanese. *Staff Report*, at II-32. In addition, responses also indicate that only for "few purchases" do purchasers find U.S. sources to be the most competitive when compared with Japanese counterparts. *Id.* at II-33.

<sup>36</sup> U.S. importers' inventories were as follows: | | short tons in 1997, | | short tons in 1998, | | short tons in 1999, | | short tons in Jan.-Mar. 1999, and | | short tons in Jan.-Mar. 2000. See *Staff Report*, at Table VII-3. Japanese producers' inventories were as follows: | | short tons in 1997, | | short tons in 1998, | | short tons in 1999, | | short tons in Jan.-Mar. 1999, and | | short tons in Jan.-Mar. 2000. See *id.* at Table VII-2.

<sup>37</sup> Seven of twelve domestic producers reported no actual negative effects on production and development, and six of twelve domestic producers reported no anticipated negative effects on production and development as a result of subject imports. See *Staff Report*, at H-4 to H-5.

<sup>38</sup> "Although there is unused production capacity in Japan, we do not believe this supports an affirmative threat determination in light of our findings regarding likely subject import volume." *Final Determination*, at 24.

Third, the court has found the Commission's earlier conclusion that nonsubject imports competitively displaced subject imports and the domestic like product to be inadequately reasoned. *See supra* Part I.C. After determining upon remand the extent to which nonsubject imports are relevant, the Commission must consider, in the context of its threat of material injury analysis, whether increases in the volumes of subject imports still "would likely be primarily at the expense of nonsubject imports." *Final Determination*, at 23. Fourth, the Commission's finding regarding likelihood of price depression and/or suppression stemmed directly from its price effects conclusions, which the court has ordered the Commission to reexamine. *See supra* Part II. The Commission must therefore undertake its threat determination anew based on its reconsidered present material injury determination.<sup>39</sup>

#### CONCLUSION

In light of the foregoing, the court cannot sustain the ITC's Final Determination. While the ITC need not address every argument and piece of evidence, *see supra* note 6, it must address significant arguments and evidence which seriously undermines its reasoning and conclusions. When considered individually every discrepancy discussed here might not rise to the level of requiring reconsideration of the overall disposition, but taken as a whole, the court finds that the ITC decision is not substantially supported and explained. On remand the agency must, consistent with this opinion, reconsider its volume, price effects, and impact findings, and upon doing so, must re-evaluate its determinations regarding present material injury and threat of material injury.

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<sup>39</sup> Plaintiffs additionally challenge the Commission's sixth and seventh observations regarding threat of material injury. These arguments are without merit. First, Plaintiffs claim that product-shifting may still result in harm to the domestic industry because even with increased third-country and home market sales, Japanese production capacity remains high. *See* Pl.'s Initial Br., at 48-49. Although production capacity reveals an increased ability on the part of the foreign industry to export dumped products to the U.S. market, on its own such a theoretical possibility is insufficient to compel an affirmative threat determination of "imminent" material injury, particularly in light of historically much higher shipments to third-country markets and the home market than to the U.S. market. *See Staff Report*, at Table VII-2. *See also Nippon Steel Corp. v. United States*, 19 CIT 450, 484 (1995) ("Although petitioners have demonstrated evidence of increased capacity, the mere fact that production may increase does not warrant a threat finding.") (citing *Hannibal Indus., Inc. v. United States*, 13 CIT 202, 209, 710 F. Supp. 332, 337-38 (1989)). Second, Plaintiffs' contest the ITC's reliance on representations of domestic producers where those |

(Slip Op. 01-117)

BAODING YUDE CHEMICAL INDUSTRY CO., LTD., BAODING ZHENXING CHEMICAL CO., LTD., AND P.H.T. INTERNATIONAL, INC., PLAINTIFFS v. UNITED STATES, DEFENDANT, AND NATION FORD CHEMICAL CO., DEFENDANT-INTERVENOR

Court No. 00-04-00162

[Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record denied.]

(Decided September 26, 2001)

*Garvey, Schubert & Barer (William E. Perry, John C. Kalitka)* for Plaintiffs.

*Robert D. McCallum, Jr.*, Assistant Attorney General, *David M. Cohen*, Director, *Janene M. Marasciullo*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Edna Boyle-Lewicki*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

*Pepper Hamilton LLP (Gregory C. Dorris, Benjamin M. Kahrl)*, for Defendant-Intervenor.

#### OPINION

**POGUE, Judge:** This action is before the Court on Plaintiffs' motion for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiffs, Baoding Yude Chemical Industry Co., Ltd., Baoding Zhenxing Chemical Co., Ltd., and P.H.T. International, Inc. (collectively "Plaintiffs"), contest the final results of the administrative review for the period August 1, 1997 through July 31, 1998 by the International Trade Administration of the U.S. Department of Commerce ("Commerce" or the "Department") of the antidumping order covering sulfanilic acid imported from the People's Republic of China ("PRC"). *See Sulfanilic Acid from the People's Republic of China*, 65 Fed. Reg. 13,366 (Dep't Commerce March 13, 2000) (final results) ("Final Results"). Specifically, Plaintiffs challenge Commerce's decision to use the Indian domestic price of aniline, rather than the price of aniline imported into India, as a surrogate value in determining the cost of production of sulfanilic acid exported from the PRC.

Sulfanilic acid is "a chemical intermediate used world wide to make whitening agents for paper, yellow food colors, concrete additives and speciality dyes." Letter From ECS to Sec. of Commerce, Petitioner's Factual Info., P.R. Doc. No. 950 at Ex. 1 (Aff. of John Dickson at 1), Def.'s Public App. at Ex. C (Jan. 20, 1999) ("Petitioner's Factual Info."). Aniline is the principal raw material used in the production of sulfanilic acid. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 2. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c)(1994).

#### BACKGROUND

Commerce calculates an antidumping duty margin by comparing an imported product's price in the United States to the normal value ("NV") of comparable merchandise. 19 U.S.C. §1677b(a)(1994). NV typically is based upon the domestic price of the product in the exporting

country. 19 U.S.C. § 1677b(a)(1)(B). When the exporting country is a nonmarket economy ("NME") country,<sup>1</sup> however, under certain circumstances Commerce must apply section 1677b(c) to determine the NV. This provision reads as follows:

(1) In general. If—

(A) the subject merchandise is exported from a nonmarket economy country, and

(B) [Commerce] finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) of this section, [Commerce] shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise \* \* \*. The valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce].

19 U.S.C. § 1677b(c). In valuing the factors of production, the statute nonexclusively instructs Commerce to determine the cost of labor, raw materials, utilities and capital costs. 19 U.S.C. § 1677b(c)(3). The purpose of section 1677b(c) is to construct the product's NV as it would have been if the NME country were a market economy country, using the best available information regarding surrogate values for the factors of production in a market economy country. See *Air Products & Chemicals, Inc. v. United States*, 22 CIT 433, 435, 14 F. Supp. 2d 737, 741 (1998) (citing *Timken Co. v. United States*, 16 CIT 142, 144, 788 F. Supp. 1216, 1218 (1992); *Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 940, 806 F. Supp. 1008, 1018 (1992));<sup>2</sup> see also *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (1999)<sup>3</sup> ("Commerce's task [is] to assess the 'price or costs' of factors of production of sulfanilic acid in India in an attempt to construct a hypothetical market value of that product in China.").

Pursuant to section 1677b(c), Commerce found the PRC to be a NME country<sup>4</sup> and chose India as the surrogate market economy country.<sup>5</sup> To construct a surrogate NV for sulfanilic acid, Commerce assigned a value to aniline, a major factor of production. See Final Results at 13,367; Pl.'s

<sup>1</sup> The term "nonmarket economy country" is defined by statute as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

<sup>2</sup> These cases, regarding Commerce's NME methodology, were decided under the pre-Uruguay Round version of the antidumping statute. However, this aspect of the statute was not changed by the Uruguay Round amendments. Compare 19 U.S.C. § 1677b(c)(1988) with 19 U.S.C. § 1677b(c)(1994).

<sup>3</sup> We refer frequently to three cases entitled *Nation Ford Chemical Co. v. United States*. These references will be abbreviated in chronological order. See *Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 985 F. Supp. 138 (1997) ("*Nation Ford I*"), aff'd, 105 F.3d 1373 (1999); *Nation Ford Chem. Co. v. United States*, 21 CIT 1378, 985 F. Supp. 138 (1997) ("*Nation Ford II*"); *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373 (1999) ("*Nation Ford III*").

<sup>4</sup> In every case conducted by the Department involving the PRC, the PRC has been treated as a nonmarket economy. "Sulfanilic Acid From the People's Republic of China," 64 Fed. Reg. 48,788, 48,791 (Dep't Commerce Sept. 8, 1999) (prelim. results) ("*Preliminary Results*").

<sup>5</sup> Finding India to be at a level of economic development comparable to the PRC and a significant producer of sulfanilic acid, Commerce selected India as the surrogate market economy country in accordance with 19 U.S.C. § 1677b(c)(4). See Preliminary Results at 48,791. No party challenges the use of India as the surrogate market economy. See Pl.'s Mem. Supp. Mot. J. Agency R. at 3; Memo from Analyst/IA to File, Selection of Significant Producer Info., PR Doc. No. 990 at 1, Def.'s Pub. App. at Ex. E (August 31, 1999) ("*Selection of Significant Producer*").

Mem. Supp. Mot. J. Agency R. at 2 ("Aniline is the principal raw material of six inputs used in the production of sulfanilic acid, constituting approximately 90 percent of the total unit cost."). While there is no material difference in quality or kind between domestic and imported aniline, see *Nation Ford I*, 21 CIT at 1372, 985 F. Supp. at 135, historically, Indian aniline producers have been protected by high import tariffs. See Issues and Decision Memo for the Administrative Review of Sulfanilic Acid from the People's Republic of China (PRC) from August 1, 1997 through July 31, 1998, P.R. Doc. No. 1057 at 7, Pl.'s App. at Ex. 6 (Mar. 6, 2000) ("Decision Memo"). Accordingly, in the original antidumping investigation as well as the following four administrative reviews, Commerce calculated the surrogate NV using the imported price of aniline.<sup>6</sup> See *Sulfanilic Acid From the People's Republic of China*, 57 Fed. Reg. 29,705 (Dep't Commerce July 6, 1992)(final determ.); *Sulfanilic Acid From the People's Republic of China*, 61 Fed. Reg. 53,711 (Dep't Commerce Oct. 15, 1996)(final results); *Sulfanilic Acid From the People's Republic of China*, 61 Fed. Reg. 53,702 (Dep't Commerce Oct. 15, 1996)(final results and partial rescission); *Sulfanilic Acid From the People's Republic of China*, 62 Fed. Reg. 48,597 (Dep't Commerce Sept. 16, 1997)(final results); *Sulfanilic Acid From the People's Republic of China*, 63 Fed. Reg. 63,834 (Dep't Commerce Nov. 17, 1998)(final results).

However, for the period of review at issue, August 1, 1997 to July 31, 1998, Commerce departed from its prior practice and calculated the surrogate NV using the domestic price of aniline. See Decision Memo at 9. The sole issue before the Court is Plaintiffs' challenge to this decision.

#### STANDARD OF REVIEW

The Court must uphold a final determination by Commerce in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law \* \* \*." 19 U.S.C. § 1516a(b)(1)(B)(1994).

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966). Thus, the Court's function is not to reweigh the evidence but rather to ascertain whether Commerce's determination is supported by substantial evidence on the record. *Matshita Elec. Indus. Corp. v. United States*, 750 F.2d 927, 936 (1984).

<sup>6</sup> *Nation Ford Company*, the sole domestic producer of sulfanilic acid, challenged the final results of the administrative reviews covering August 1, 1993 to July 31, 1994 and August 1, 1994 to July 31, 1995. See *Nation Ford I*, 21 CIT 1371, 985 F. Supp. 133; *Nation Ford II*, 21 CIT 1378, 985 F. Supp. 138. This Court sustained Commerce's final decisions in both cases. See *Nation Ford I*, 21 CIT 1371, 985 F. Supp. 133; *Nation Ford II*, 21 CIT 1378, 985 F. Supp. 138. The Court of Appeals for the Federal Circuit ("CAFC") affirmed this Court's decision for the administrative review covering August 1, 1993 to June 31, 1995. See *Nation Ford III*, 166 F.3d 1373.

## DISCUSSION

Plaintiffs make two claims. First, Plaintiffs argue that Commerce's determination is contrary to law in that the agency failed to adequately justify its departure from prior practice. See Pl.'s Mem. Supp. Mot. J. Agency R. at 20. Second, Plaintiffs maintain that Commerce's conclusion that the domestic price constitutes the best available information in this circumstance is unsupported by substantial evidence on the record. See *id.* at 21-30. For the reasons discussed below, the Court rejects both claims and sustains Commerce's decision to use the domestic price of aniline as a factor of production.

*I. Commerce Adequately Justified Its Departure From Prior Practice*

Plaintiffs, in their briefs, outline the original antidumping investigation concerning sulfanilic acid from the PRC and the four subsequent administrative reviews. See *id.* at 7-16. As Plaintiffs correctly note, "in almost ten years of initial investigations and administrative review investigations of sulfanilic acid from the PRC, as well as the preliminary determination in this review, the Department used the data for the lower priced imported aniline \* \* \*." *Id.* at 3 (internal citations omitted). Plaintiffs argue that this departure from previous practice is an abuse of discretion.<sup>7</sup> See *id.* at 20.

More specifically, Plaintiffs argue that Commerce failed to comply with *Allegheny Ludlum Corporation v. United States*, 24 CIT \_\_\_, \_\_\_, 112 F. Supp. 2d 1141, 1147 (2000), ruling that "an agency must either conform its actions to its prior decisions or explain the reasons for its departure." See Pl.'s Mem. Supp. Mot. J. Agency R. at 20. We agree that the principle stated in *Allegheny* is controlling. The Decision Memo, adopted by Commerce in the Final Results, however, clearly refutes Plaintiffs' allegation that Commerce failed to articulate its reasons for departing from prior practice.

In the Decision Memo, Commerce reviewed the parties' arguments concerning the appropriate selection of a surrogate value. See Decision Memo at 7-9 (summarizing in length the parties' arguments). Commerce outlines four specific and independent grounds upon which it based its decision to use the domestic price of aniline. See *id.* at 9. First, Commerce concluded that the reduction in the high Indian tariff rate effectively removed the previous distortions in the domestic price. See *id.* Second, Commerce concluded that the increased exports of aniline products from India suggested that Indian manufacturers and exporters no longer depended on imported aniline. See *id.* Third, Commerce further concluded from the decrease in domestic price "to a level comparable to the published export price," that during the period of review Indian manufacturers and exporters used domestically produced aniline. *Id.* Finally, Commerce noted that the record contains information from

<sup>7</sup> Plaintiffs point out that the preliminary results of the administrative review at issue, which used the import price of aniline in its calculations, followed Commerce's prior practice. See Pl.'s Mem. Supp. Mot. J. Agency R. at 3. Commerce, however, is not obligated to calculate the values of factors of production as they were calculated by Commerce during the preliminary investigation. See *Coalition for the Preservation of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 23 CIT \_\_\_, \_\_\_, 44 F. Supp. 2d 229, 259 (1999) ("Coalition").

which the domestic price of aniline could be adjusted accurately for excise and local taxes.<sup>8</sup> See *id.*

Commerce's articulation of these four independent grounds for its departure from prior practice satisfies the principle set forth in *Allegheny*. Therefore, we reject Plaintiffs' contention and hold that Commerce acted in accordance with law. *Allegheny* provides Commerce with some flexibility, recognizing that "[e]xperience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in the light of new insights and changed circumstances." *Cultivos Miramonte S.A. & Flores Mocari S.A. v. United States*, 21 CIT 1059, 1064, 980 F. Supp. 1268, 1274 n.6 (1997)(emphasis added)(quoting *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994)).

The CAFC affirmed Commerce's original decision to use the import price of aniline due to the distortions caused by the abnormally high tariff rate of 85 percent. See *Nation Ford III*, 166 F.3d at 1377-78. The reduction in the tariff rate eliminated the original, primary reason for using the import price. Thus, Commerce's articulated reasons, if supported by substantial evidence, appropriately adapt an existing methodology for determining the surrogate NV of sulfanilic acid to the change in circumstances in the Indian domestic aniline market.

## II. Commerce's Articulated Reasons Are Supported By Substantial Evidence

Section 1677b(c)(1)(B) requires Commerce to calculate factors of production on the basis of the best available information. The statute, however, leaves the phrase "best available information" undefined. See *Shandong Huarong Gen. Corp.*, slip op. 01-88, at 12 (CIT July 23, 2001). For this reason, the Court has recognized that "the process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise." *Nation Ford III*, 166 F.3d at 1377 (internal citations omitted). Providing Commerce with only guidelines, Section 1677b(c) grants Commerce substantial discretion in the valuation of the factors of production. See *id.*

The purpose of the statute necessarily curtails Commerce's otherwise wide discretion. See *Coalition*, 23 CIT at \_\_\_, 44 F. Supp. 2d at 258 (citing *GMN Georg Muller Nurnberg AG v. United States*, 15 CIT 174, 178, 763 F. Supp. 607, 611 (1991)). More specifically, Commerce must "estimate as accurately as possible what the market price of aniline would have been in the PRC 'if such prices were \* \* \* determined by market forces.'" *Nation Ford I*, 21 CIT at 1373, 985 F. Supp. at 135 (internal citations omitted); see also *Writing Instrument Mfrs. Ass'n, Pencil Section v.*

<sup>8</sup>The articulation of these four reasons for selecting the domestic price of aniline effectively dispels the Plaintiff's claim that Commerce's decision is "arbitrary and capricious." See Pl.'s Mem. Supp. Mot. J. Agency R. at 20. The arbitrary and capricious standard is extremely deferential. See *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It requires only that Commerce articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assoc.*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The four separate reasons articulated by Commerce meet this threshold.

*United States*, 21 CIT 1185, 1191, 984 F. Supp. 629, 637 (1997) ("The Court finds that the paramount objective of the statute is to obtain the most accurate determination of dumping margins utilizing the best information available within the broad outlines of the statute."). "Commerce [however] need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was a reasonable way." *Coalition*, 23 CIT at \_\_\_, 44 F. Supp. 2d at 258 (internal citations omitted); see also *Shandong Huarong Gen. Corp.*, slip op. 01-88, at 12.

Plaintiffs appear to argue that despite the change in circumstances the price of imported aniline remained the best available information for the administrative review at issue, as was the case in past administrative reviews. See Pl.'s Mem. Supp. Mot. J. Agency R. at 23. Plaintiffs challenge the evidentiary support for three of the four factors upon which Commerce relied in making its decision that the domestic price of aniline constituted the best available information.<sup>9</sup> See Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 5. Plaintiffs submit that this decision is not supported by substantial evidence and therefore cannot meet the standard of review for sustaining Commerce's determinations. See *id.* at 4-5.

Commerce, however, correctly notes that simply because the price of imported aniline constituted the best available information for the preceding reviews does not prove that such price remains the best available information for the review now at issue. See Def.'s Mem. Opp'n Mot. J. Agency R. at 34. Rather, what information is the best available information "will necessarily depend on the circumstances \* \* \*." See *id.* at 17, 34 (citing *Nation Ford III*, 166 F.3d at 1377). Commerce maintains, and we agree, that the record demonstrates that there exist substantial changes in the Indian aniline market which support Commerce's decision that the domestic price of aniline constitutes the best available information.<sup>10</sup>

#### A. *The Import Duty Rate Decline for Aniline Effectively Removed Distortions*

Throughout previous administrative reviews of sulfanilic acid, Commerce determined that India's Advance License Program protected its

<sup>9</sup> Plaintiffs do not challenge Commerce's assertion that information on the record enables the accurate adjustment of the domestic price to account for local and excise taxes. See Pl.'s Mem. Supp. Mot. J. Agency R. at 16-17.

<sup>10</sup> Commerce, in its briefs, proffers three additional reasons for rejecting the price of imported aniline. First, there is evidence suggesting that the price of aniline imports was a consequence of dumping. See Def.'s Mem. Opp'n to Mot. J. Agency R. at 32. Second, the record reveals that prices in the world aniline market are dependent on production facilities. See Letter From ECS to Sec. of Commerce, Petitioner's Factual Info., C.R. Doc. No. 949 at Momentum Consultants' Report on World Aniline Prices, Dec. 1998 at 000054 ("Confidential Info."). Third, the record contains evidence that most imported aniline is sold in bulk quantities greatly in excess of the quantity purchased by Indian sulfanilic acid producers. See Br. From Law Firm of Hogan Hartson to Sec. of Commerce, Petitioner's Case Br., P.R. Doc. No. 1046 at 28-29, Def.'s Pub. App. at Ex. G (Jan. 14, 2000) ("Hogan Hartson") (internal citations omitted). This evidence has not been specifically cited by Commerce as a factor in its decision. Commerce is "presumed \* \* \* to have considered all pertinent information sought to be brought to its attention \* \* \* [and] there is no statutory requirement that [Commerce] explicitly discuss every piece of record evidence that is put before it in an investigation." *Allegheny Ludlum Corp.*, 24 CIT at \_\_\_, 112 F. Supp. 2d at 1165. Nonetheless, this Court cannot rely on these reasons for Commerce's decision because they were not relied upon by the agency in its decision. See *U.S. Steel Group v. United States*, 24 CIT \_\_\_, 123 F. Supp. 2d 1365, 1369, (2000); see also *Burlington Truck Lines*, 371 U.S. 156, 168-69 ("The Courts may not accept \* \* \* counsel's post hoc rationalizations for agency action; [SEC v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis in the order by the agency itself.").

domestic aniline industry from global competition by imposing an 85 percent *ad valorem* tariff rate on aniline imports. See e.g. *Nation Ford III*, 166 F.3d at 1375. This high protective tariff, a classic example of a nonmarket force, see *Nation Ford I*, 21 CIT at 1374, 985 F. Supp. at 135-36, greatly inflated the cost of domestically produced aniline. See *Nation Ford III*, 166 F.3d at 1375. Heeding Congress' directive to avoid such distortions, Commerce, in the prior reviews, therefore used the price of aniline imported into India to determine the surrogate value in the PRC. See H.R. Conf. Rep. No. 100-576 at 590 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1623.

For the period of review covered by this case, however, India had reduced the rate of duty on aniline imports from 85 percent to 30 percent. See Decision Memo at 9. Because all parties agree that during this period of review the import tariff was 30 percent, the issue is whether Commerce properly accorded significance to this duty reduction in relying on the domestic price of aniline.<sup>11</sup> Plaintiffs argue that, while notable, the reduction in the tariff rate did not eliminate the pricing distortions in the Indian aniline market. See Pl.'s Reply Mem. Supp. Agency R. at 5. The United States, as noted by the Plaintiffs, imposes a tariff rate of only 9.3 percent on imported aniline. See Pl.'s Mem. Supp. Agency R. at 22 (internal citations omitted). Invoking a comparison with the Indian import tariff, Plaintiffs declare that 30 percent is still a relatively high tariff rate and therefore Commerce should have continued to use the price of imported aniline in its cost analysis. See *id.*

Commerce argues that the reduction in the tariff rate effectively removed the distortions in the domestic price caused by the previously "abnormally high" rate of 85 percent. See Decision Memo at 9. Such a reduction is significant in this case because of the role the "abnormally high" tariff rate played in the previous administrative reviews. This abnormally high tariff rate was previously identified as the primary reason that Commerce chose the price of imported aniline as the surrogate value for the PRC product rather than the domestic price. See *Nation Ford III*, 166 F.3d at 1377-78. The CAFC sustained Commerce's prior selection of the import price primarily because the domestic price was "distorted by the tariff". See *id.* at 1377-78. Accordingly, "when the tariff rates changed dramatically, the rationale for using the import prices dissipated as well." Def.-Int.'s Mem. Opp'n to Mot. J. Agency R. at 11; see also Decision Memo at 9. Additionally, the current tariff rate of 30 percent "equals the rate applicable to two other inputs for which we have used domestic prices as surrogate values (sulfuric acid and sodium bicarbonate)." Decision Memo at 9.

Furthermore, as Commerce argues, the United States tariff rate should not be used as a point of reference for evaluating surrogate val-

<sup>11</sup> Plaintiffs attribute some significance to the fact that India may increase the import tariff sometime in the future. See Pl.'s Mem. Supp. Mot. J. Agency R. at 22. The administrative review at hand covers only the period from August 1, 1997 to July 31, 1998. Consequently, the possibility of an increase in the import tariff is irrelevant. See *Torrington Co. v. United States*, 24 CIT \_\_\_\_\_, 116 F. Supp. 2d 1206, 1213 (2000); *Sanyo Electric Co., Ltd. v. United States*, 22 CIT 304, 309-10, 9 F. Supp. 2d 688, 694 (1994).

ues because the United States and India are not on similar levels of economic development. See Petitioner's Factual Info. at 17; Def.'s Mem. Opp'n to Mot. J. Agency R. at 27; cf. 19 U.S.C. §1677b(c)(4). Aniline prices are country specific, i.e., the price of aniline varies according to the level of production at each country's facilities. See Def.'s Mem. Opp'n to Mot. J. Agency R. at 28 n.6; Confidential Info. at 000054. The United States, at an advanced level of production relative to India, is able to produce aniline at a lower cost, and the import tariff reflects this fact. See Def.'s Mem. Opp'n to Mot. J. Agency R. at 28 n.6; Confidential Info. at 000054. Therefore, the United States, able to produce aniline cheaply, does not need to protect its domestic industry with a high import tariff. Here, the United States is not the surrogate for the PRC; India is. See Selection of Significant Producer at 1.<sup>12</sup>

Moreover, section 1677b(c)(1)(B) grants Commerce substantial discretion to choose the best information available. Inherent in this discretion is Commerce's ability, within the confines of section 1677b(c)'s guidelines, to decide that an 85 percent tariff distorts the domestic prices while a 30 percent tariff does not. This type of line-drawing exercise is precisely the type of discretion left within the agency's domain. There are no set rules for determining best available information; rather, Commerce makes the decision on a case-by-case basis, attempting to obtain the most accurate determination for each specific case. See *Nation Ford III*, 116 F.3d at 1377. Best information available is dependent on the circumstances during the POI. See *id.* Commerce then takes into account any factors that may distort either the import or domestic price thereby not making it useful surrogate data or the best information available. This Court had previously held that an 85 percent tariff was too high. See *Nation Ford II*, 21 CIT 1378, 985 F. Supp. 138. At some point between 85 percent and no tariff, Commerce has the ability, as long as this decision is supported by substantial evidence, to determine that the tariff rate is no longer distorting the domestic data. Here, Commerce used this discretion to determine that a 30 percent tariff no longer

<sup>12</sup> Plaintiffs further argue that Commerce should have used the import price as "it is the Department's practice, when the data are equal in terms of specificity, contemporaneity, and representativeness, to use an import price over a domestic price because the former is reported on a duty-exclusive, tax exclusive basis, while the latter almost always is not." Pl.'s Reply Mot. J. Agency R. at 11 (quoting *Sulfanilic Acid From the People's Republic of China*, 63 Fed. Reg. 63,834, 63,838). This Court, however, has upheld Commerce's use of domestic prices to determine the surrogate normal value when the domestic price is more indicative of actual value than the import price. See *Kerr-McGee Chem. Corp. v. United States*, 21 CIT 1353, 1365, 985 F. Supp. 1166, 1177 (1997); see also *Pure Magnesium from the People's Republic of China*, 63 Fed. Reg. 3,085, 3,087 (Dep't Commerce Jan. 21, 1998); *Certain Cut-To-Length Carbon Steel Plate from the People's Republic of China*, 62 Fed. Reg. 61,964, 61,966 (Dep't Commerce Nov. 20, 1997); *Brake Drums and Brake Rotors from the People's Republic of China*, 62 Fed. Reg. 9,160, 9,163 (Dep't Commerce Feb. 28, 1997). Here, Commerce found, and Plaintiffs do not challenge, that the domestic price can be accurately adjusted for local and excise taxes. Once adjusted, Commerce determined that the domestic price is the best available information for constructing what the cost of aniline in the PRC would be if it was a market economy. Therefore, the policy behind Commerce's preference, expressed in *Sulfanilic Acid From the People's Republic of China*, is not relevant in this case.

distorted the domestic price, and this decision is supported by substantial evidence.<sup>13</sup>

#### *B. India is a Net Exporter of Aniline*

The Decision Memo states "the dramatic growth in aniline exports prior to and during the [period of review] as evidenced by the Monthly Statistics of the Foreign Trade of India (MSFTI), suggests that Indian manufacturers and exporters are no longer reliant on imported aniline to produce sulfanilic acid." Decision Memo at 9. Plaintiffs, asserting that this statement is merely an assumption without any evidentiary support, argue that the continued existence of India's Advance License Program reveals that Indian sulfanilic acid producers still use imported aniline. See Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 12-13. Plaintiffs further speculate that the growth in Indian exports of aniline is the result of dumping. See *id.* at 13. Finally, Plaintiffs argue that "reasonable Indian manufacturers of sulfanilic acid for export would use only the lower-priced imported aniline to produce for export." *Id.*

Commerce's determination that there was a significant increase in aniline exports prior to and during the period of review is supported by substantial evidence. Specifically, evidence in the record demonstrates that between 1996 and 1999 Indian aniline production has tripled. See Hogan Hartson at 22-23 (internal citation omitted). During this same period, Indian aniline exports increased ten-fold. See *id.* at 23. Evidence suggests that at least 59 percent of aniline derivatives exported from India were made with domestically produced aniline. See *id.*; see also Confidential Information at 000041 [ ]. While it is true that no evidence was submitted to indicate how much sulfanilic acid was produced with domestically produced aniline, Plaintiffs submitted no evidence to suggest that sulfanilic acid differed from the other aniline derivatives. Here, although the evidence supports conclusions other than those reached by Commerce, there is also sufficient evidence to support Commerce's determination. See *Consolo*, 383 U.S. at 620.

#### *C. The Decline in the Domestic Price of Aniline*

While Plaintiffs concede that Indian domestic prices for aniline would fall as the tariff rate applied to such imported merchandise declines, they seemingly are unwilling to accept Commerce's conclusion that domestic prices for aniline have in fact fallen. See Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 14-15 (referring to the "purported downward trend"). Commerce, however, cites evidence submitted by the Plaintiffs themselves which reveals that domestic prices have demonstrably declined. See Def.'s Mem. Opp'n to Mot. J. Agency R at 27-28; Aniline Market Prices. Because the record demonstrates a downward trend in the

<sup>13</sup> Plaintiffs further argue that when the weight-averaged Indian domestic price of 40.0641 Rs/kg is discounted by the tariff rate, the result is equal to the import price. See Pl.'s Reply at 10. According to Plaintiffs, this demonstrates that the domestic price is distorted by the tariff rate. See *id.* It is more appropriate, however, to look at the import price of 28.04 Rs/kg, see *id.*, and adjust that price by the tariff rate. The result is 36.452 Rs/kg. This price is lower than the domestic price, supporting Commerce's decision that the 30 percent tariff does not distort the domestic price.

price of domestic aniline, it is the Plaintiffs' second argument concerning the decrease in price which warrants examination.

Accepting, *arguendo*, that the domestic price has fallen considerably, Plaintiffs maintain that the domestic price of aniline continues to be distorted due to the remaining 30 percent import tariff. *See* Pl.'s Reply Mem. Supp. J. Agency R. at 14. Thus, Plaintiffs charge that Commerce should conclude that the price reduction has resulted in the continued use of imported aniline for export of sulfanilic acid. *See id.* Plaintiffs assert that from a "pure economics/common sense" perspective Indian producers must continue to use the cheaper, imported aniline. *Id.* at 15.

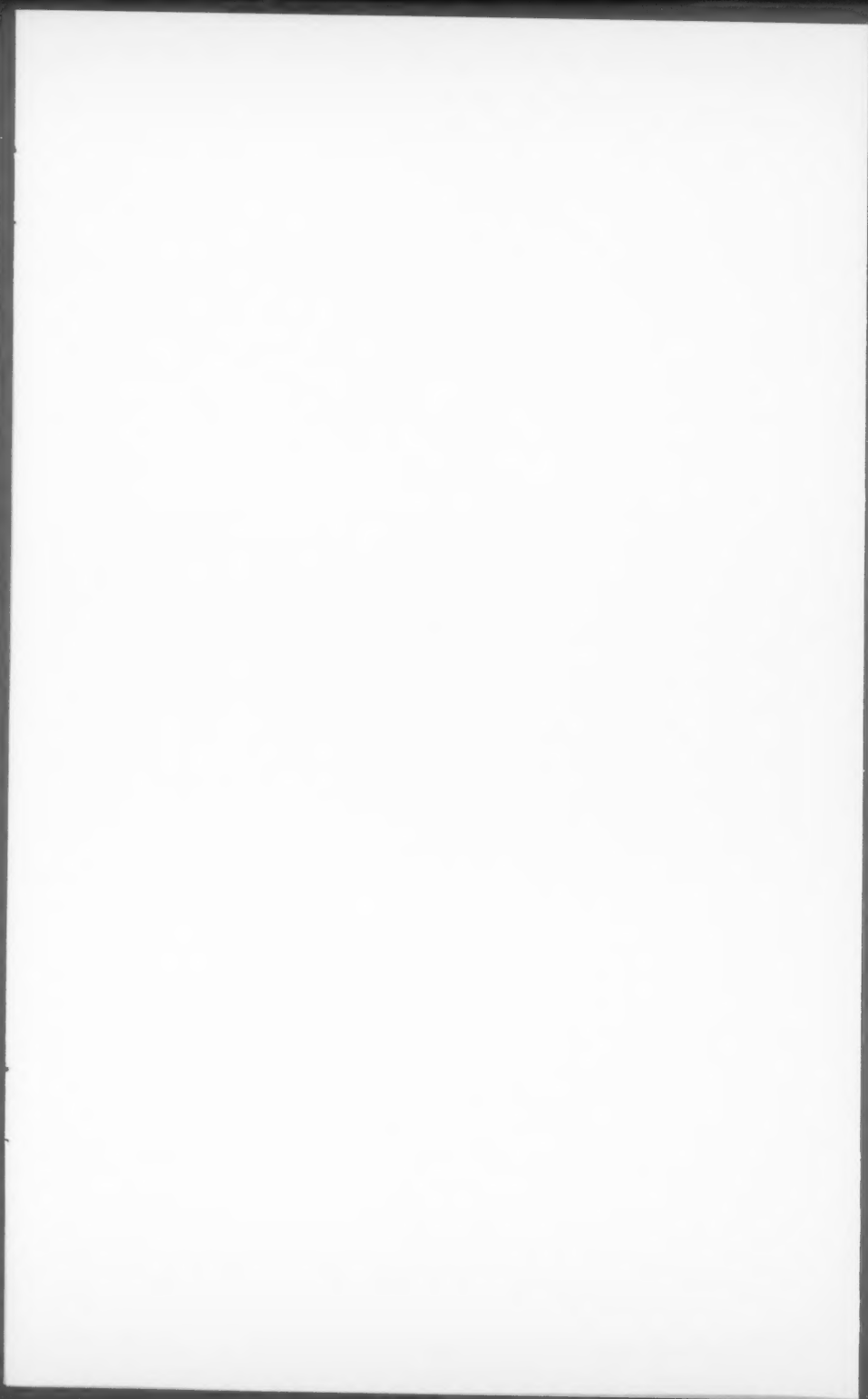
Specifically, Plaintiffs make a comparison between the average Indian export price of sulfanilic acid during 1996-1997, which is 46.22 Rs/Kg, and the lowest average per unit Indian domestic aniline price during 1996-1997, which is 48.5 Rs/Kg. *See id.* at 16 (internal citations omitted). From this comparison, Plaintiffs conclude that the only rational conclusion is that Indian producers of sulfanilic acid use imported aniline given the continued existence of the Advance License Program. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 24-25. As Commerce notes, however, the average price of sulfanilic acid exported to the United States from India during the period of review was 72.29 Rs/kg. *See* Def.'s Mem. Opp'n Mot. J. Agency R. at 29-30; Letter From Law Firm Williams, Mullen, Clark & Dobbins, Respondents' Surrogate Data, P.R. Doc. No. 965 at Table of Exports of Sulfanilic Acid, Pl.'s App. at 4 (July 14, 1999) ("Exports of Sulfanilic Acid"). Thus, Commerce rationally concludes that Indian exporters of sulfanilic acid could use domestic aniline and still make a profit. Commerce argues, and we agree, that it may appropriately rely on this comparison because the ultimate question is to construct "what price the PRC would have paid for aniline used to produce sulfanilic acid for export to the United States." Def.'s Mem. Opp'n Mot. J. Agency R. at 30 n.7.

Assuming, *arguendo*, that some Indian exports of sulfanilic acid may be produced from imported aniline, the Plaintiffs' reliance on this fact is nonetheless misplaced. The "factors of production" methodology does not require Commerce to calculate the surrogate NV on the basis of what Indian producers use. *See Nation Ford III*, 166 F.3d at 1377. Rather, in selecting surrogate values, Commerce is guided by the purpose of the factors of production methodology, which "is not to construct the cost of manufacturing the subject merchandise in India per se, but to use data from one or more surrogate countries to construct what the cost of production would have been in China were China a market economy country." *Tapered Roller Bearings From the People's Republic of China*, 62 Fed. Reg. 6,189, 6,193 (Dep't Commerce Feb. 11, 1997) (final results); *see also Tianjin Machinery Import & Export Corp. v. United States*, 16 CIT at 940, 806 F. Supp. at 1018; *Nation Ford III*, 166 F.3d at 1375 ("Commerce's task [is] to assess the 'price or costs' of factors of production of sulfanilic acid in India in an attempt to construct a hypothetical market value of that product in China.").

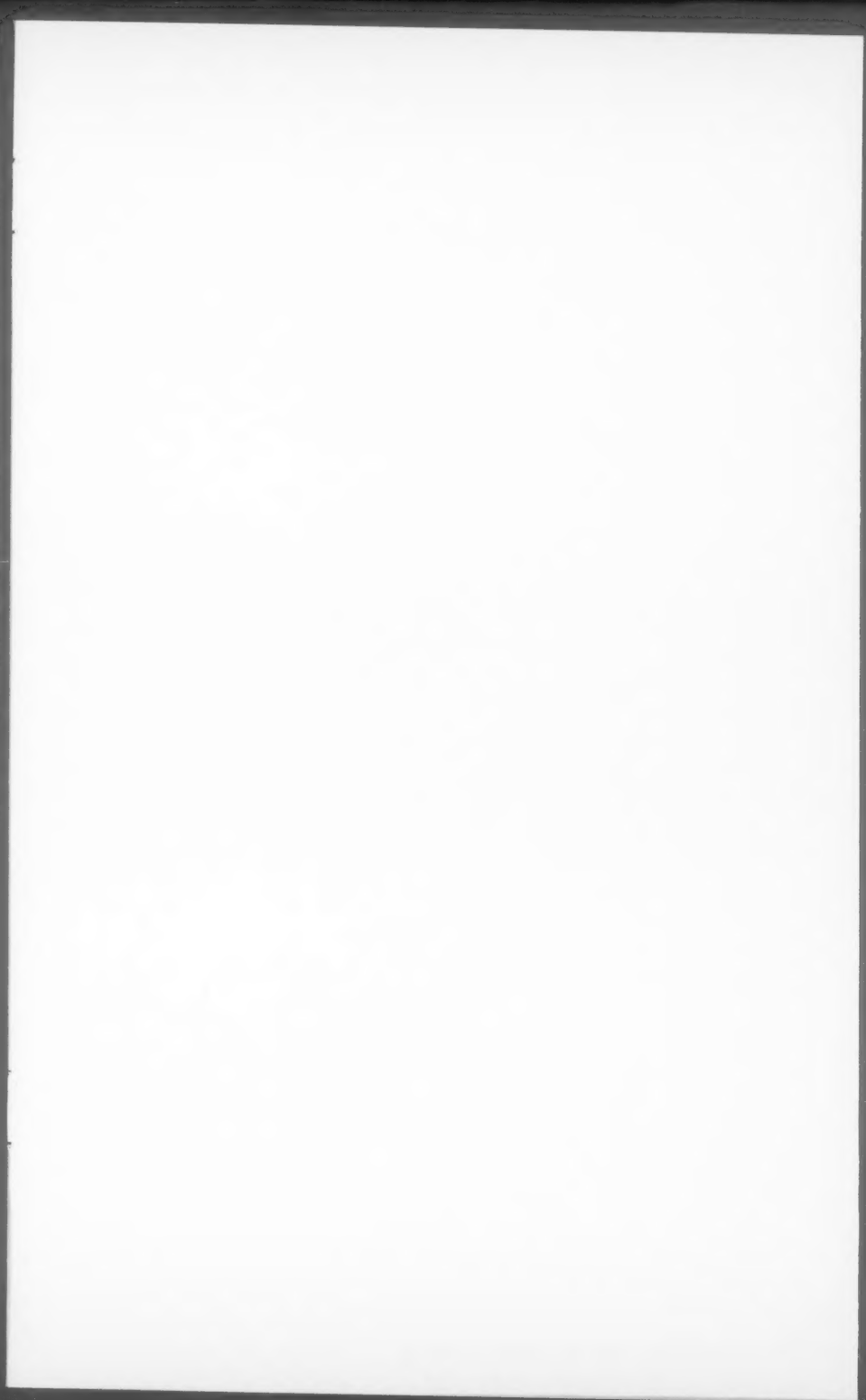
For the case at hand, Commerce attempted to construct the cost of aniline in the PRC as if the PRC were a market economy country. To be affirmed, Commerce "need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was a reasonable way." *Coalition*, 23 CIT at \_\_\_, 44 F. Supp. 2d at 258. The domestic price of aniline has demonstrably declined. See Def.'s Mem. Opp.'n to Mot. J. Agency R. at 27-28; Aniline Market Prices. The record also contains evidence which indicates that at least 59 percent of aniline derivatives exported from Indian are produced with domestically produced aniline. See Hogan Hartson at 23 (internal citations omitted). This evidence led Commerce to decide that the lower tariff rate enabled domestic aniline to be used in the production of sulfanilic acid for export. Thus, the Court finds that Commerce's determination is supported by substantial evidence.

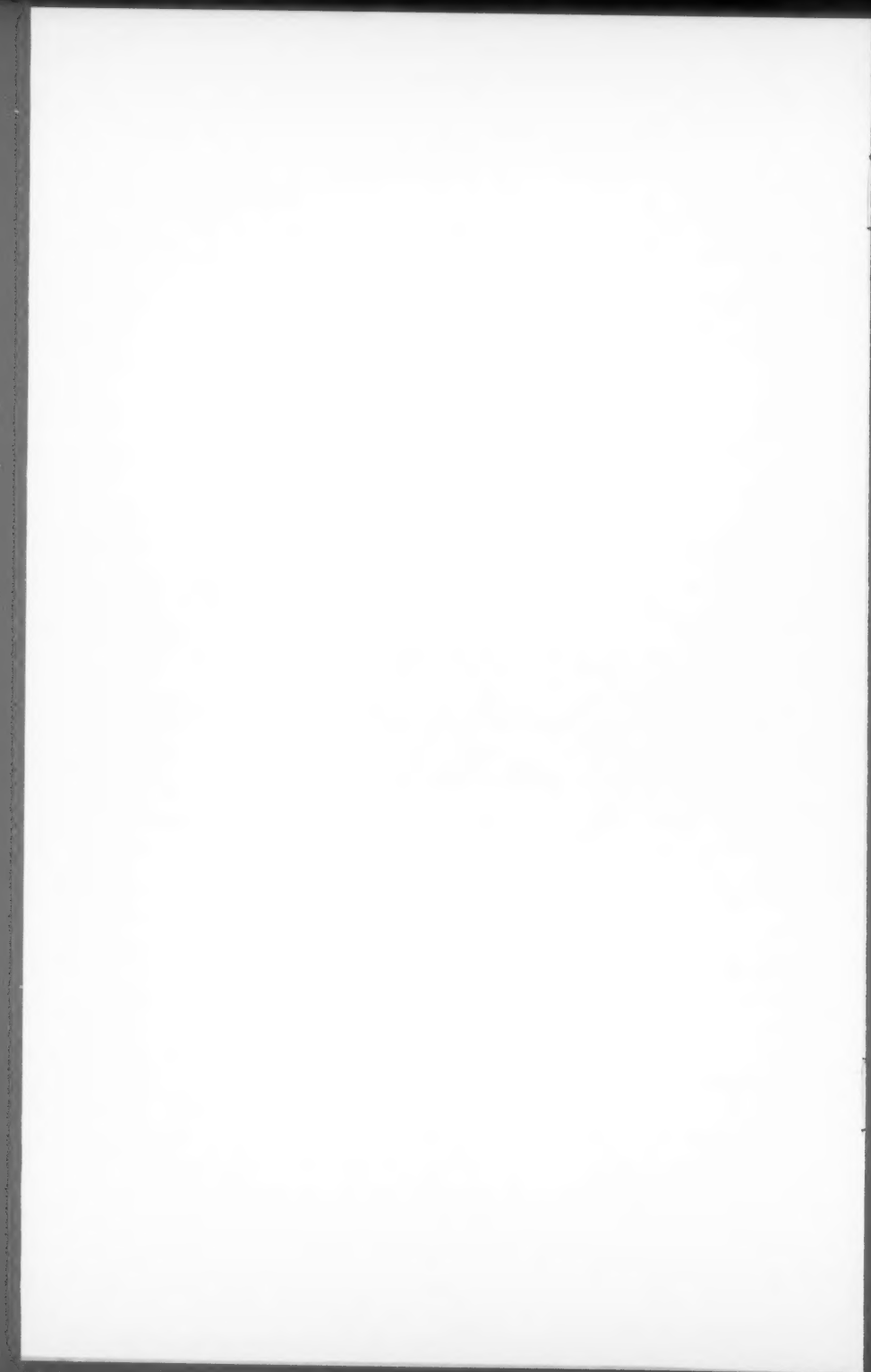
#### CONCLUSION

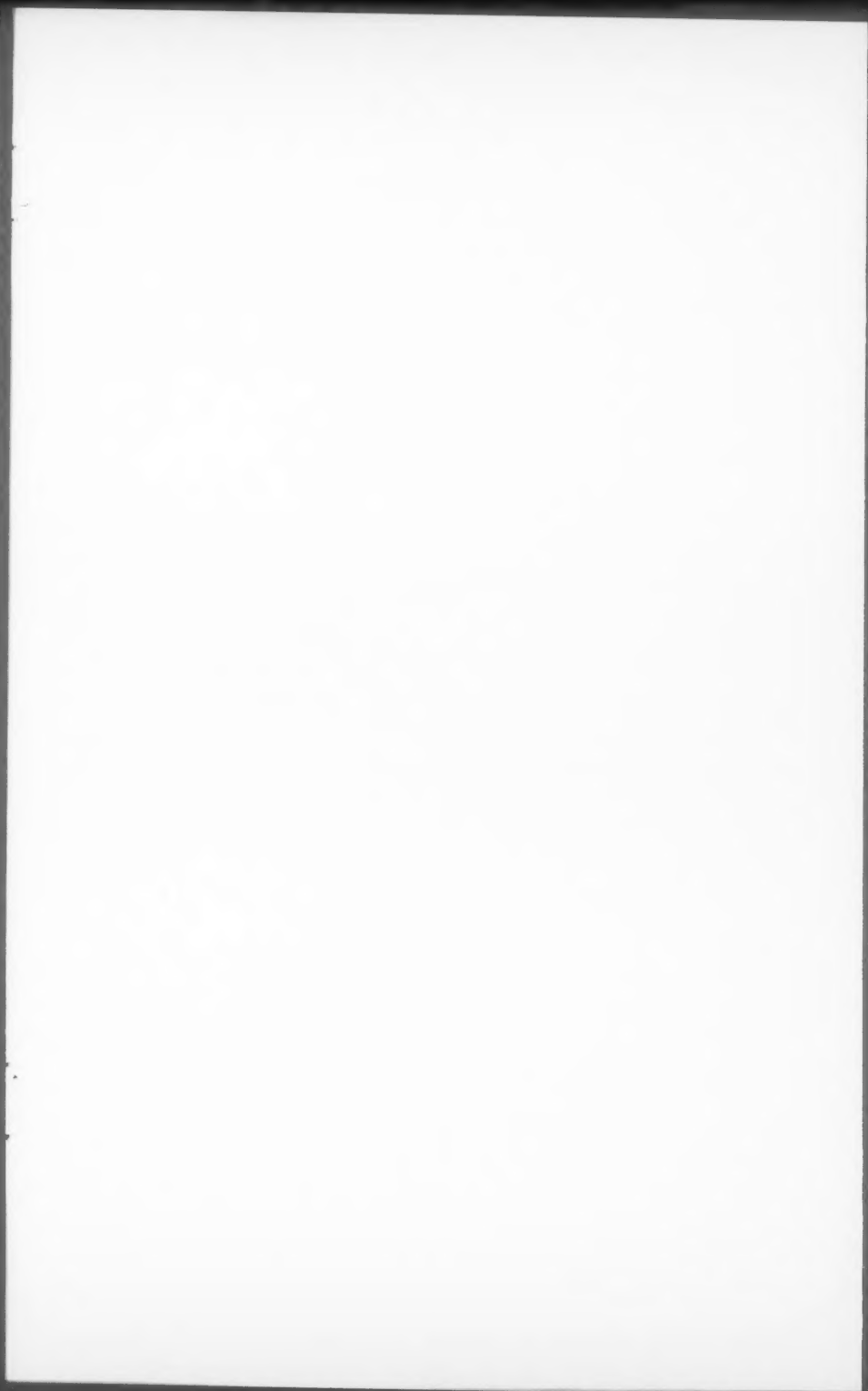
The record clearly reveals numerous changes in the Indian domestic aniline market, notably, that for the entire period of review at issue the import tariff on aniline was reduced from 85 percent to 30 percent. Examining these changes, Commerce concluded that the domestic price of aniline constituted best available information. By articulating a reasonable rationale for departing from prior practice, Commerce acted in accordance with law. Moreover, the totality of the changes in the Indian domestic aniline market provide a reasonable basis for Commerce's decision and the premises in Commerce's analysis are supported by substantial evidence. For these reasons, the Court sustains Commerce's decision to use the domestic price of aniline in constructing the surrogate NV. Accordingly, Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record is denied. Judgment will be entered accordingly.

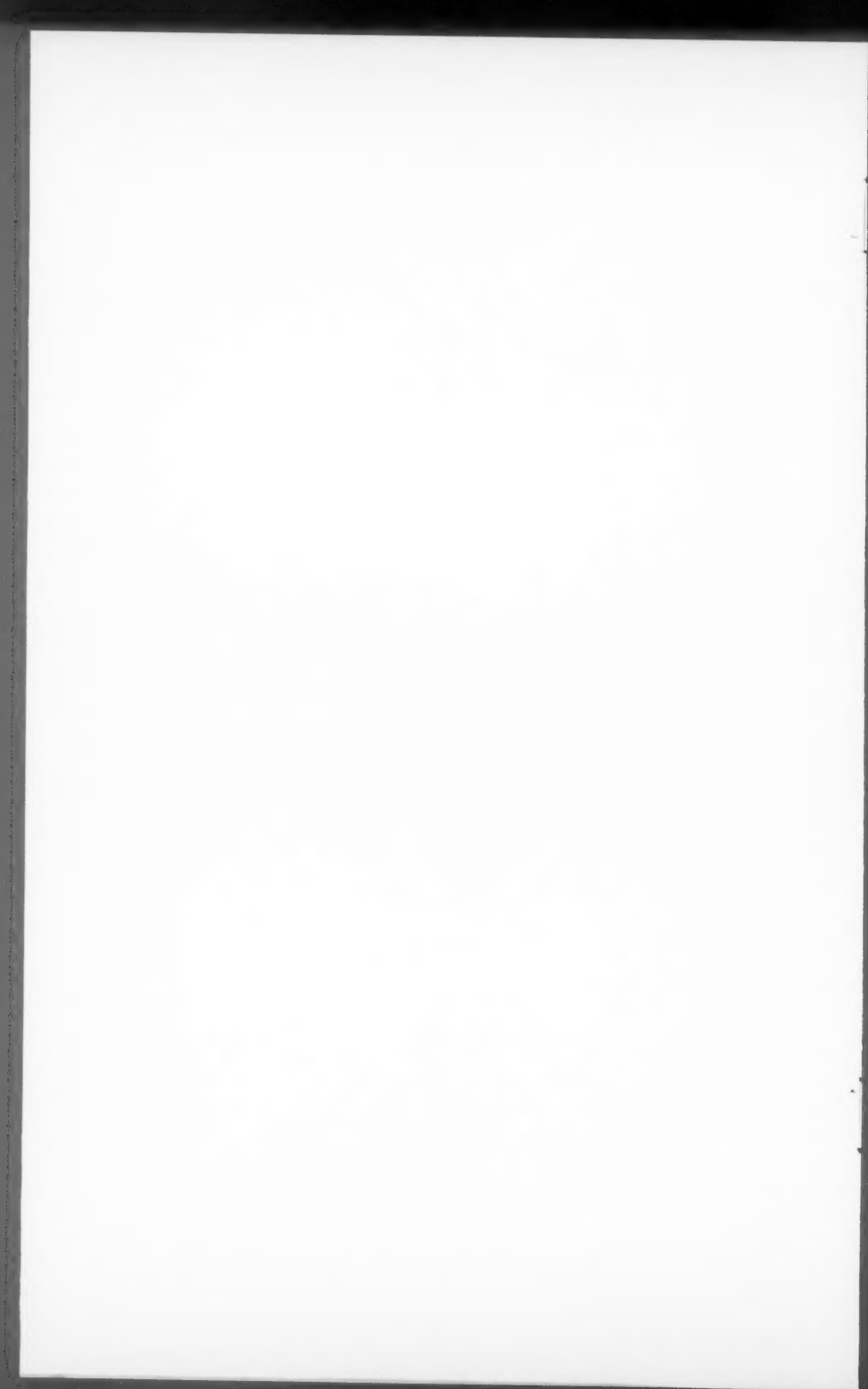












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